cites to *Metro Stevedore Co. v. Rambo*[12] as support, Pet. App. 13. The LHWCA's definition of disability does allow for disability to be interpreted in economic terms when the economic incapacity is a result of an injury. This was the case in *Rambo* where the court was looking at the effects of the injury as they may naturally extend into the future and affect a claimant's future wage-earning capacity.[13] The Ninth Circuit's expanded definition of total disability is completely unrelated to the status or possible future status of a claimant's injury. Instead, according to the Ninth Circuit, Mr. Castro's inability to work is based on his participation in vocational rehabilitation, regardless of his injury.[14] The Ninth Circuit definition of "total disability" is not supported by the language of the LHWCA.

Today, the Act remains as Congress intended: void of any provision requiring employers to pay for total disability while a claimant is undergoing vocational rehabilitation. As if to underscore this point, the Act does provide for "maintenance for employees undergoing vocational rehabilitation" not to exceed $25.00, to be paid, not by employers, but by the special fund. 33 U.S.C. § 908(g) reads:

> Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for remunerative occupation and who, under the direction of the Secretary as

---

[12] *Metropolitan Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 121, 126-27 (1997).

[13] *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 296-98 (1995).

[14] In dismissing General Construction's argument that Mr. Castro's case was distinguishable from the facts in *Abbott*, the Ninth Circuit states that the LHWCA provides for compensation "under a variety of circumstances," and cites to the language of 33 U.S.C. §§ 902(10) and 908(a). Pet. App. 16-17. However, like 33 U.S.C. § 902(10) in which the claimant's incapacity must be "because of injury," 33 U.S.C. § 908(a) also defines a claimant's incapacity in direct relationship to the injury. See App. 106.

> provided by section 39(c) of this Act, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 44.

The Ninth Circuit addressed this point in a footnote, stating that the phrase "additional compensation" indicated that Congress intended the $25.00 to be paid in addition to total disability payments during vocational rehabilitation. Pet. App. 15. This tortured interpretation is not supported by the plain language of the Act or its legislative history. Section 6(b) of the Act sets the maximum compensation for disability at 200 percent of the applicable national average weekly wage. App. 105. The Ninth Circuit's nonsensical interpretation of the Act is that the Section 6(b) maximum is not really the maximum. The real maximum, for the new class of employees created by the Ninth Circuit, is 200 percent of the applicable national average weekly wage, plus $25.00. According to the Ninth Circuit's interpretation of Section 8(g), only employees who participate in Department of Labor sponsored vocational rehabilitation plan are entitled to this newly created Section 6(b) "enhancement."

In the absence of any other language in the Act that supports total disability payments during vocational rehabilitation, a more reasonable interpretation is that the "compensation" referred to in section 8(g) is set forth in section 39(c), and includes "information and assistance," the furnishing of necessary "prosthetic appliances," and at the Secretary of Labor's discretion, "such amounts that may be necessary to procure such [rehabilitation] services, the money for which will be provided by the Special Fund." App. 109. "Compensation" can be anything that makes up for a loss, it does not have to be monetary. The only form of monetary compensation under sections 8(g) and 39(c) is that which must come out of the special fund.

This interpretation is supported by the legislative history of the Act. Sections 8(g) and 39(c) of the 1984 version of the Act are identical to the 1978 version sections. Commenting on the 1972 version of the Act during the congressional hearings, then Deputy Secretary of Labor, John B. Mumford stated: "Rehabilitation is not mandatory. It is an option. Our function is to serve as an intermediary . . . the statute doesn't require total disability compensation continue through the rehabilitation, but the statute does provide for small allowance." App. 34. This was apparently also the understanding of the Senate. In the Senate's version of S. 1182, Congress proposed removing section 8(g) of the act that allowed for $25 "maintenance" and replacing it with language that provided "temporary total or partial compensation during the period of rehabilitation." App. 15-17. The bill was rejected and the 1984 version of section 8(g) retains the "maintenance" or "small allowance" and does not include temporary total disability during vocational rehabilitation.[15]

II. The Ninth Circuit's Opinion Conflicts With Two Important Goals Of The Act: (1) Returning Claimants To Work Quickly, And (2) Maintaining The Delicate Balances And Fragile Consensus Between Business And Labor

The Ninth Circuit defends the new benefits on the grounds that it promotes "A principal policy of the LHWCA: the encouragement of vocational rehabilitation." Pet. App. 13. To support this statement the Ninth Circuit refers to the fact that the Secretary of Labor is charged with "directing the vocational rehabilitation of permanently disabled employees and arranging for the benefits of such rehabilitation."[16] *Id.* In fact, the legislative history

---

[15] See full text of 33 U.S.C. § 908(g) in Section I of this brief.

[16] 33 U.S.C. § 939(c) is set forth App. 109. Sections 39(c)(2) and 8(g), are the only two places in the LHWCA that vocational rehabilitation is

(Continued on following page)

of the LHWCA reflects that the encouragement of vocational rehabilitation was not as high a priority for Congress as were the goals of returning claimants to work quickly, and creating what congressmen referred to as "fragile consensus" between business and labor. App. 3, 10, 34-35, 48, 61-62, 70, 82-83, 87, 93-94, 97. By focusing exclusively on the policy of encouraging vocational rehabilitation, the Ninth Circuit has disrupted these two other important policies of the Act.

The legislative history of the LHWCA reflects Congress' goal of having claimants return to work quickly. At the time Congress considered the 1984 amendments, the problem of claimants prolonging the rehabilitative process in order to continue to receive the Act's generous benefits was exacerbated by the dramatic increase in number of claims filed, and the corresponding skyrocketing costs to employers. App. 72, 74-75, 81-84, 88-89. Between 1972 and 1977, LHWCA claims jumped 185% meaning that one in five longshoremen filed a claim. App. 72. By 1981 benefits had increased by 551%. App. 74. Fraud and abuse were also significant problems. App. 3, 8, 10, 12, 14, 71, 73, 76, 81-82, 93-94.

Evidence before Congress indicated that claimants were prolonging rehabilitation in order to receive benefits payments without having to work. App. 28-29, 48-49, 93-94.

---

mentioned. The Code of Federal Regulations defines the parameters of the Director of Labors responsibilities regarding rehabilitation for Longshore claimants. For example 20 C.F.R. § 702.506 states: "[v]ocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially . . . " Nothing in the Act or the Code of Federal Regulations refers to disability payments during vocational rehabilitation. In fact, the Ninth Circuit's interpretation of the Act encourages extended training for claimants and is at odds with the Director of Labor's responsibility to create "short" programs. This was the result for the claimants in *Castro, Abbott,* and *Newport News.*

Congress reviewed statistics that demonstrated that a significant number of claimants never completed rehabilitative programs due to failures to keep appointments, lack of interest, and a host of other problems outside of the employers control. App. 40-45, 102-103. Associate Director of Longshoremen's and Harbor Workers' Compensation, John Stocker, testified that only three claimants out of 450 that were screened for rehabilitation in the New York area actually completed training courses. App. 39. One witness stated: "the work ethic has changed in the last decade and there is no incentive, economic or otherwise, for some to return to work." App. 97. Representative Erlenborn indicated that one of the problems with the pre-1984 Act, was that its "liberal benefits" did not encourage rehabilitation and the return to work. App. 87.

Both Houses of Congress explored how the payment of temporary total disability during vocational rehabilitation would affect a claimant's motivation to return to work. One witness recommended that "[i]f the Act were to require ... temporary total compensation during the rehabilitation effort, then it should ... [also] require the injured worker to participate in rehabilitation." App. 103. A provision similar to this appeared in H.R. 7610, and S. 1182. App. 7, 15-17. Another witness admitted that Longshoremen had a "certain reluctance" to train for work in other fields. App. 36. It was also noted in the hearings before the House, "[during] rehabilitation ... the possibilities of returning to work improve considerably if the compensation payments are limited in amount and/or duration to eliminate the secondary gain of being off work." App. 94. In the end, Congress excluded all provisions from the Act that would have provided temporary total disability payments to claimants during vocational rehabilitation.

A related congressional goal was balancing the concerns of business and labor. Like most workers' compensation acts, the LHWCA is remedial in that "it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled employers."[17] Employees are provided with the benefit of a more certain recovery for work-related harms, but the statute was not intended to provide complete compensation for the wage-earners loss. *Id.* Congress did not create this balance easily. Representative Miller pointed out that the amendments were a product of exhaustive and thoughtful consideration and that Congress had spoken clearly in statutory language. App. 1. Congressman Miller, one of the most actively involved Congressmen, went so far as to expressly state: "we meant what we said, and said what we meant . . . [i]f it isn't in the statute or clarified in the statement of managers, it should be accorded little if any legislative intent." *Id.* Senator Orrin Hatch pointed out that the 1984 amendments reflected a compromise between business and labor not easily reached, but fashioned through intense debate and guided by many people, and cautioned against destroying the "delicate balance" and "fragile consensus" between business and labor that Congress had strived for in drafting the LHWCA. App. 70.

---

[17] *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 258, 281 (1980).

III. Congress Affirmatively Excluded Language From The LHWCA That Would Have Provided For Temporary Total Disability Payments During Vocational Rehabilitation

The Ninth Circuit characterized the extensive legislative history of the LHWCA as "congressional inaction." Pet. App. 14. In fact, the legislative record for the 1984 Amendments spans more than eight years, includes hearings and comments before two House of Representative subcommittees and two Senate committees, and encompasses more than 5,400 pages of testimony before the respective bodies of Congress. App. 3. Congress thoroughly considered the revisions to the Act, including several proposed amendments concerning claimant's entitlement to total disability benefits during vocational rehabilitation and the workers' compensation statutes in all 50 states. App. 6-7, 10-13, 15-17, 51-57.

In June 1980, Congressman John N. Erlenborn introduced a bill, H.R. 7610 which stated: "an employee who as a result of injury is undergoing vocational rehabilitation . . . shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation." App. 7. The bill was never enacted. In May 1981, Senator Sam Nunn and Senator Don Nickles introduced S. 1182. App. 15-17. Senate bill 1182 read very much like H.R. 7610 and specified, "an employee who as a result of an injury is undergoing vocational rehabilitation . . . shall receive continued temporary total or partial compensation during the period of rehabilitation." *Id.* However, S. 1182 also died in the House during the course of negotiations. Undeterred, the Senate introduced S. 38. App. 13. Senate bill 38 eventually became law, but not before temporary total disability benefits during vocational rehabilitation were removed. App. 20-21.

In light of the fact that Congress affirmatively removed from the LHWCA the very benefits that the Ninth Circuit now seeks to bestow, it is inaccurate for the Ninth

Circuit to characterize the legislative history of LHWCA as "congressional inaction." These bills demonstrate that Congress had moved beyond mere contemplation of allowing for temporary total disability benefits during vocational rehabilitation and had actually allotted for those benefits in the earlier proposals for the 1984 Amendments. On three occasions Congress considered the possibility of allowing a claimant to receive total and partial disability compensation during vocational rehabilitation and on three separate occasions the Majority expressly, and affirmatively, removed the provision from the Act. App. 7, 15-17, 20-21.

The Ninth Circuit's reliance on *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[18] and *United States v. Wise,*[19] as justification for dismissing the extensive legislative history of the LHWCA is misplaced. Pet. App. 14. In *Central Bank,* this Court rejected an argument to insert language into the statute at issue that Congress had excluded from the plain language of that statute.[20] This Court responded that "Congress knew how to impose aiding and abetting liability when it chose to do so . . . [i]f Congress had intended to impose aiding and abetting liability, we presume it would have used the words "aid" and "abet" in the statutory text.[21] *Amicus curiae* agrees. An identical argument is appropriate here. Congress knew how to provide plaintiffs with total disability during vocational rehabilitation. Congress drafted three bills that had provided for those benefits. Congress also reviewed state workers' compensation legislation that had provided for those benefits. If Congress had intended to provide claimants total disability during vocational

---

[18] 511 U.S. 164 (1994).

[19] 370 U.S. 405 (1962).

[20] 511 U.S. at 185.

[21] 511 U.S. at 176-77.

rehabilitation, Congress would have included the very language that it had explicitly rejected.

Unlike the facts in *Wise*, the inference that "the existing legislation already incorporated the offered change"[22] cannot be made in this case. Congress was well aware that the 1972 version of the Act did not provide total disability during rehabilitation. As stated in Section I, above, Deputy Assistant Secretary, Jon. B. Mumford, testified that "the [1972 version of the] statute doesn't require total disability compensation [to] continue through the rehabilitation . . . " App. 34. The record is also clear that Congress knew that vocational rehabilitation would not be available under the 1984 version of the LHWCA, because John N. Erlenborn noted that the final version of the bill included a series of changes demanded by the majority which were in his mind "unacceptable" but nonetheless "necessary." App. 20-22. One of these changes was the elimination of benefits during vocational rehabilitation. App. 21. As a result of the provisions demanded by the Majority and concessions made by the Minority, the Majority proceeded to strike any language in the 1984 Amendments that allowed for temporary total disability benefits during vocational rehabilitation. An inference in this case, even a *Wise* one, is not warranted because the facts are clear that Congress knew that the 1984 version of the LHWCA would not contain disability benefits during vocational rehabilitation.

During its extensive hearings, Congress also reviewed the manner in which the states had structured their own workers' compensation statutes. App. 50-57. The U.S. Department of Labor provided charts specifying the manner and to what extent each state provided for total disability compensation during rehabilitation. *Id.* At the time Congress was drafting the 1984 Amendments to the Act, California had an explicit provision in its workers' compensation act entitling an employee to temporary

---

[22] 370 U.S. at 411.

disability and then a maintenance allowance of two-thirds the employee's average weekly earnings, up to a statutory maximum. Cal. Lab. Code § 139.5(c).[23] This provision is nearly identical to the entitlement that is now available in the Fifth, Fourth, and Ninth Circuits, with one vital exception. At the time Congress reviewed the state statutes, the California statute provided extensive due process procedures for both claimants and employers including employer responsibility to notify claimant of the availability of rehabilitation;[24] joint responsibility of employee and employer to initiate a rehabilitation plan;[25] the requirement that the injured employee cooperate in carrying out the rehabilitation plan;[26] and the right of voluntary acceptance of

---

[23] Congress reviewed workers' compensation statutes from all 50 states, in 1978. At that time Cal. Lab. Code § 139.5(c) stated:

> When a qualified injured worker chooses to enroll in a rehabilitation program, he shall continue to receive temporary disability indemnity payments, plus additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training, at the expense of the employer or insurance carrier, as the case may be.

In 1984, when Congress amended the LHWCA, the language of Cal. Lab. Code § 139.5(c) had not changed.

[24] In 1978, Section 6201 of the California Labor Code stated:

> The employer or insurance carrier shall notify the injured employee of the availability of rehabilitation services in those cases where there is continuing disability of 28 days and beyond. Notification shall be made at the time the employee is paid retroactively for the first day of disability (in cases of 28 days of continuing disability or hospitalization) which has previously been uncompensated. A copy of said notification shall be forwarded to the State Department of Rehabilitation.

[25] In 1978, Section 6202 of the California Labor Code stated: "The initiation of a rehabilitation plan shall be the joint responsibility of the injured employee, and the employer or the insurance carrier."

[26] In 1978, Section 6204 of the California Labor Code stated:

> An injured employee agreeing to a rehabilitation plan shall cooperate in carrying it out. On his unreasonable refusal to

(Continued on following page)

a rehabilitation program by the employer, insurance carrier, or employee.[27] This language of the California's workers' compensation statute had not changed when Congress enacted the 1984 Amendments to the LHWCA.[28] If Congress had wanted to provide temporary total disability to claimants during vocational rehabilitation, Section 39 of the Act, and its implementing regulations, would more closely resemble those state statutes that provide for this benefit. Rather than limiting the amount of compensation a claimant may receive, Section 39 would have set forth the due process procedures necessary to make the benefits constitutionally viable. Congressional deliberations never moved in that direction. Instead, the language requiring total disability during vocational rehabilitation was removed from the bills before the 1984 amendments were enacted.

IV. The Ninth Circuit Ruling In *Castro* Creates An Entitlement To Total Disability Benefits That Congress Had Expressly Removed From The Act

The Ninth Circuit attempts to distinguish the new benefits it grants claimants from the benefits Congress explicitly rejected by stating that the legislation Congress rejected would have created an entitlement to disability benefits during rehabilitation. Pet. App. 14-15. In contrast,

---

comply with the provisions of the rehabilitation plan, the injured employee's rights to further subsistence shall be suspended until compliance is obtained, except that the payment of temporary or permanent disability indemnity, which would be payable regardless of the rehabilitation plan, shall not be suspended.

[27] In 1978, Section 6208 of the California Labor Code stated: "The initiation and acceptance of a rehabilitation program shall be voluntary and not compulsory upon the employer, the insurance carrier, or the injured employee."

[28] In 2004, California repealed the provisions allowing for maintenance and disability replaced it with a more cost efficient supplemental job displacement benefit consisting of vouchers for vocational rehabilitation. See App. 64-66 and Cal. Lab. Code § 4658.5.

the Ninth Circuit argues, "the *Abbott* rule requires a fact-finder to consider on a case-by-case basis an injured worker's participation in a rehabilitation program as one factor in determining whether suitable alternative employment is available to the worker." *Id.* The result of the Ninth Circuit decision is that all workers will be "entitled" to this new benefit where the issue is not litigated. In the minority of cases that are referred to the ALJ for trial, the *Abbott* case by case analysis will be applied. The Ninth Circuit refers to two cases as examples of circumstances in which a claimant would not receive total disability during vocational rehabilitation. Pet. App. 15. In *Kee v. Newport News Shipbuilding & Dry Dock Co.*, the claimant submitted no evidence that he was unable to work during his vocational rehabilitation program.[29] In *Gregory v. Norfolk Shipbuilding and Dry Dock Company* the ALJ inferred that claimant was capable of working during vocational rehabilitation because she actually was working during vocational rehabilitation.[30] According to these cases, the only circumstances in which a claimant will be denied total disability payments during vocational rehabilitation under *Abbott, Newport News,* and *Castro* are those where either the claimant either presents no evidence whatsoever to indicate that he or she cannot work, or where claimant actually does work. This presents obvious disincentives for claimants to return to work.

The award of virtually all benefits under the LHWCA is subject to some form of fact-finding process, and, in that sense, the total disability entitlement during vocational rehabilitation judicially created by the Ninth Circuit is no different than any other benefit already set forth in the LHWCA. Claimants have an extremely low hurdle to jump to meet the *Abbott* criteria. The Ninth Circuit's characterization of *Abbott* as providing different benefits than those

---

[29] 33 Ben. Rev. Bd. Serv. (MB) 221 (2000).

[30] 32 Ben. Rev. Bd. Serv. (MB) 264 (1998).

explicitly rejected by the legislature because *Abbott* requires an analysis on a "case-by-case" basis, is a ruse. The result is identical. In the vast majority of cases, claimants will be entitled to the benefits that Congress explicitly rejected when drafting the LHWCA.

CONCLUSION

The Ninth Circuit has created a significant detour in the roadmap set out for the compensation of disabilities under the LHWCA. This detour is unsupported by the plain language of the Act or by the Act's legislative history. The detour upsets the delicate balances Congress sought to achieve by giving claimants a virtual entitlement to total disability benefits during vocational rehabilitation: benefits which Congress explicitly withheld in order to achieve the necessary balances. For the reasons set forth above, the Court should grant General Construction Company and Liberty Northwest Insurance Corp.'s Petition for Writ of Certiorari, and reverse or vacate that portion of the Ninth Circuit's opinion that grants claimants total disability benefits during vocational rehabilitation under the LHWCA.

Respectfully submitted,

ROGER A. LEVY
Counsel of Record
DEBORAH C. GARDENER
LAUGHLIN, FALBO, LEVY & MORESI
39 Drumm Street
San Francisco, California 94111
(415) 781-6676

APPENDIX
TABLE OF CONTENTS

APPENDIX
TABLE OF CONTENTS – Continued

Page

HOUSE REPORT ON CONFERENCE REPORT ON S. 38, LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT AMENDMENTS OF 1984 (SEPTEMBER 18, 1984)

CONFERENCE REPORT ON S. 38, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1984

Mr. MILLER of California, Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, it has been 4 years since the Subcommittee on Labor Standards began its work on legislation to amend the "Longshoremen and Harbor Workers' Compensation Act." The conference report before us today is the product of thorough, exhaustive, and thoughtful consideration.

This is a consensus report. It received the unanimous support of every member of the conference committee, from both parties and every ideology. To make certain that there is no grounds for misinterpretation or abuse, either by those charged with enforcing the law, the courts, or others, we have spoken very clearly both in the statutory language and in the statement of managers.

We meant what we said, and we said what we meant. We do not want to see protracted court battles over the intent of Congress. If it isn't in the statute or clarified in the statement of managers, it should be accorded little if any legislative intent.

This is a complicated bill but its underlying principle is really quite simple. Some employers and employees who were never supposed to be covered by the Longshore Act

have been included in its coverage; some of the benefits have been excessive.

By the same token, individuals who should receive Longshore Act compensation, medical assistance, death and survivor benefits have found the law and the courts unresponsive to their legitimate claims for assistance, as documented in yesterday's Washington Post.

* * *

Mr. Speaker, there are numerous other provisions of this conference report which will have a meritorious effect on the operation of the Longshore Program, and will serve the best interests of employers and employees alike.

I am very grateful for the cooperation and support offered this legislation by all of my colleagues on the conference committee, which unanimously approved this report.

I am also pleased that associations representing shipyards, marinas, and other employers, insurance associations, and the AFL-CIO have enthusiastically endorsed this legislation.

After 4 years of work, the time has come to make this important legislation law. I urge my colleagues to suspend the rules and pass the conference report on S. 38.

Mr. ERLENBORN. Mr. Speaker, I rise in support of the conference report.

This legislation marks the culmination of an extraordinarily difficult effort to amend, the Longshoremen's and Harbor Workers' Compensation Act, probably the worst workers' compensation law in the country. It corrects

manifold inequities and abuses stemming from Congress' hastily considered and ill-advised 1972 amendments.

Rarely, if ever, in my 28 years' experience as a legislator has the record of abuse and inequity been so voluminous, so overwhelming and efforts to remedy these abuses and inequities been so often exasperating, frustrating, and protracted. The hearing record extends over 8 years, encompassing two House subcommittees, two Senate committees, and seven volumes of testimony totaling 5,470 pages.

Today, Mr. Speaker, we write the final chapter to the dismal and destructive legacy of the 1972 amendments. Those amendments may have provided new protections to injured workers, but at an unacceptably high cost to employers, and insurers and thereby, further eroded the economic competitiveness of the maritime industry.

Today, unlike in 1972, when the amendments were crafted in the dead of night by Senate staff, the House has before it a balanced product, one which retains important and needed protections for injured workers and their families, tempered by added employer, insurer, and Labor Department controls which will assure workers' compensation benefits to those deserving of them while also affording the means in better control program costs and abuse.

I commend, first, the gentleman from California [Mr. MILLER] for agreeing on the need for changes and for persevering to the end. I also want to recognize the unflagging efforts of the Longshore Action Committee – the employer and insurer coalition of over 70 members which persisted, often in the face of adversity, and which has withstood the test of disappointment. That such a group

could remain unified for so long, I believe, is a testament to the rightness of their cause.

I would be remiss, however, if I failed to mention the efforts of Senators NICHLES and HATCH, and their staffs, who in early 1981 began the process we complete today, and of former Deputy Under Secretary of Labor, Robert Collyer, and his staff, who focused a young administration on the necessity for revamping the act.

With enactment of these longshore amendments only the Federal Employers' Compensation Act [FECA] remains among the Department of Labor's so-called terribly trilogy of workers' compensation programs still untouched.

In 1981 Congress amended the Black Lung Benefits and Revenue Acts to address the burgeoning black lung disability trust fund deficit and made several cosmetic changes in entitlement. Much more needs to be done but, at least, a first, if faint-hearted, attempt has been made.

Today, Congress corrects the abysmal record of the 1972 Longshore Act Amendments. Next year, it should remedy the 1974 FECA amendments which have driven annual program costs to over $1 billion. The troubled FECA program has been a frequent subject of comment by the General Accounting Office and the Department's Inspector General.

So, I would encourage the gentleman from California to move ahead.

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
Supplement

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LABOR STANDARDS

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

HEARINGS HELD IN WASHINGTON, D.C.,
ON NOVEMBER 13, 14, 15, 27; AND DECEMBER 6, 1979

Printed for the use of the Committee
on Education and Labor

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON: 1980

INTRODUCTION

This is a supplement to the subcommittee's oversight hearings in the 96th Congress on the Longshoremen's and Harbor Workers' Compensation Act which are available in a separate volume. The following material submitted by Hon. John N. Erlenborn, a Representative in Congress

from the State of Illinois, was inadvertently omitted from the original hearing record.

(III)

96TH CONGRESS' **H.R. 7610**
2d SESSION

To amend the Longshoremen's and Harbor Workers' Compensation Act to revise the manner of computing the benefits provided under such Act, to provide for certification of physicians eligible to provide medical care to workers covered by such Act, to provide for an attorney to serve as the representative of the special fund established under such Act, to establish a Benefits Review Board the members of which are appointed by the President, to establish an advisory committee to evaluate the manner in which the provisions of the Act are carried out, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 1980

Mr. ERLENBORN (for himself, Mr. EDWANDS of Alabama, Mr. EDWARDS of Oklahoma, Mr. GOODLING, Mr. MCCLOSHEY, and Mr. BUCHANAN) introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act . . .

* * *

(g) Subsections (g) through (i) of section 8 of the Act are amended to read as follows:

"(g) COMPENSATION FOR EMPLOYEES UNDERGOING VOCATIONAL REHABILITATION. – An employee who as a result of injury is undergoing vocational rehabilitation for remunerative employment under the direction of the deputy commissioner as provided by section 39(c) of this Act, or with the approval of the employer, shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation. No award for permanent disability may be entered before the deputy commissioner determines, or the employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed. If an employee unreasonably refuses to undergo vocational rehabilitation, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of such refusal.

* * *

Calendar No. 134

98TH CONGRESS *First Session*	SENATE	REPORT No. 98-81

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1983

May 10 (legislative day, May 9), 1983. – Ordered to be printed

---

Mr. Hatch, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 38]

The Committee on Labor and Human Resources, to which was referred the bill (S. 38) to amend the Longshoremen's and Harbor Workers' Compensation Act in order to improve the administration of the Act, to reduce incentives for fraud and abuse, to assure immediate compensation benefits and competent medical treatment for injured employees, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill as amended do pass.

CONTENTS

I. Committee Amendment as Reported

The bill, which was reported with committee amendment, provides:

* * *

Beginning in 1977, the respective labor committees of the Senate and the House have conducted series of oversight hearings on the LHWCA and on the impact of the 1972 amendments. The Subcommittee on Compensation, Health and Safety, of the House Committee on Education and Labor held eight days of hearings during the first session of the 95th Congress and nine days of hearings in the second session. Hearings continued in both the House and the Senate during the 96th Congress. Employers, insurance carriers, unions, and employee representatives presented varying views. Employers and carriers expressed

concern over unclear jurisdiction, benefit levels, unrelated death benefits, annual adjustments in compensation, the Special Fund's growing liability, and the timely administration and adjudication of claims. Employee representatives expressed overall support for the current law but indicated concern over inadequate administration by the Department of Labor.

It is clear from the abundant record developed at the ovesight hearings that a pressing need exists to revise portions of the act. The courts and agencies have found coverage to exist in situations which are not warranted. Features of the benefit structure have made it difficult to calculate future costs, and in some cases made the act uninsurable. Claims processing features have made the act susceptible to fraud and abuse. Finally, the act does not contain sufficient incentives for injured workers to seek rehabilitation and to return to work.

IV. History of S. 38

A. The 97th Congress

At the beginning of the 97th Congress, the Permanent Subcommittee on Investigations of the Senate Committee on governmental Affairs held six days of hearings on waterfront corruption and influence of organized crime in a number of east and gulf coast ports. The hearings were the culmination of an investigation commenced the previous year by Senator Nunn and the Department Justice's Operation UNIRAC.

Soon after the conclusion of the Permanent Subcommittee Investigations hearings, Senators Nickles and Nunn on May 14, 1981 introduced the comprehensive Longshoremen's and Harbor Workers' Compensation

reform bill S. 1182. This Committee's Subcommittee on Labor held four days of hearings on S. 1182 and developed a hearing record of 1241 pages. Interested parties from labor, management, and government presented their views.

The following criticisms emerged from these hearings.

First. Jurisdiction: It is alleged that the extension to "adjoining" areas leaves vague and unclear just what operations on land are covered. The small recreational boatyards, in particular, are state of uncertainty as to the status of their employees working locations which are not geographically adjacent to navigable waters. The small boat and barge builders expressed concern about their employees who may be involved in nonmaritime construction during extensive periods of the year.

Second. Unrelated death benefits: The law provides that if a claimant receives compensation benefits for either permanent partial or permanent total disability and then dies from any cause; his widow and/or survivors would be entitled to certain benefits. It is contended this has the effect of adding a life insurance policy to workers' compensation law.

Third. Annual escalation of benefits: It has been contended that the unpredictability of future, annual escalation of benefits makes insurance premium assessment equally unpredictable, resulting in higher insurance costs.

Fourth. No limitation on weekly benefits to widows and/or survivors in case of death: Since there is a maximum payable for total permanent disability, it is alleged that, in certain instances, a widow could receive higher

benefits from the death of the employee than if he was receiving total permanent disability benefits.

Fifth. Procedure for establishing loss of wage-earning capacity: It has been stated that in some cases a claimant receives compensation in excess of his take-home wages prior to injury.

Sixth. Employers' access to an independent physical examination: It has been alleged that in certain district offices, the deputy commissioners are unwilling to order an independent medical examination of a claimant at the request of an employer.

Seventh. Settlements: It has been alleged that the administrative law judges have no authority to approve settlements, which results in excessive litigation.

Eighth. Waste, fraud, and abuse: During the course of the hearings before the Permanent Subcommittee on Investigations as well as this committee's consideration of the bill, testimony was received concerning the potential for abuse of this act. It has not been clearly established that, in certain instances, the provisions of the act have been abused by corrupt individuals so that corrective action to eliminate this potential is necessary.

On October 28, 1981, the Labor Subcommittee reported to the full committee the bill with an amendment in the nature of a substitute. On December 15, 1981, February 9, and May 25, 1982, the full committee met in executive session to consider the bill. An amendment in the nature of a substitute was adopted and ordered reported by unanimous vote. The committee amendment, as explained below, addresses each of the above concerns.

On July 27, 1982, S. 1182 passed the Senate by a voice vote. The bill, upon delivery to the other body, was referred to the House Education and Labor Committee. On August 17, the Labor Standards Subcommittee conducted a hearing. Negotiations on a compromise bill began immediately thereafter and ensued until the end of the second session. A final compromise did not emerge.

B. The 98th Congress

S. 38 was introduced on January 26, 1983. It embodies the provisions of S. 1182 as passed by the Senate in the 97th Congress. The bill was reported by the Labor Subcommittee on April 11 to the full committee. On May 4, the committee agreed to report the bill.

V. HEARINGS

A. The 97th Congress

Public hearings on S. 1182 were conducted by the Subcommittee on Labor on June 16, 17, 23, and October 5, 1981.

* * *

App. 14

S. Rep. No. 97-498 at p.___(1982)

Calendar No. 710

97TH CONGRESS *Second Session*	SENATE	REPORT No. 97-498

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1982

JULY 19 (legislative day, JULY 12), 1982. – Ordered to be printed

---

Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 1182]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1182) to amend the Longshoreman's and Harbor Workers' Compensation Act in order to improve the administration of the Act, to reduce incentives for fraud and abuse, to assure immediate compensation benefits and competent medical treatment for injured employees, and for other purposes, having considered the same, reports favorably thereon, with an amendment and an amendment to the title, and recommends that the bill as amended do pass.

CONTENTS

I. COMMITTEE AMENDMENT AS REPORTED

The Committee amendment provides:

> That (a) this Act may be cited as the "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1982".

* * *

(g) Subsections (g) through (i) of section 8 are amended to read as follows:

"(g) Compensation for employees undergoing vocational rehabilitation:

> "(1) An employee who as a result of an injury is undergoing vocational rehabilitation for remunerative employment under the supervision of the deputy commissioner, pursuant to section 39(c), or with the approval of the employer, shall receive continued temporary total or partial compensation during the period of rehabilitation.

"(2) An award for permanent disability may not be entered before the deputy commissioner determines, or the employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed.

"(3) If an employee unreasonably refuses to undergo vocational rehabilitation or to participate in a reasonable plan offered and financed by the employer to return the injured employee to work, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of the refusal.

* * *

(g) [Maintenance] *Compensation* for employees undergoing vocation rehabilitation: [An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 39(c) of this Act, is being rendered fit to engage in remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 44.]

(1) An employee who as a result of an injury is undergoing vocational rehabilitation for remunerative employment under the supervision of the deputy commissioner, pursuant to section 39(c), or with the approval of the employer, shall receive continued temporary total or partial compensation during the period of rehabilitation.

(2) An award for permanent disability may not be entered before the deputy commissioner determines, or the

employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed.

(3) If an employee unreasonably refuses to undergo vocational rehabilitation or to participate in a reasonable plan offered and financed by the employer to return the injured employee to work, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of the refusal.

* * *

LEGISLATIVE HISTORY
P.L. 98-426

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1984

P.L. 98-426, see page 98 Stat. 1639

Senate Report (Labor and Human Resources Committee)
No. 98-81, May 10, 1983 [To accompany S. 38]

House Report (Education and Labor Committee)
No. 98-570 (I and II). Nov. 18, 1983, Feb. 7, 1984
[To accompany S. 38]

House Conference Report No. 98-1027, Sept. 14, 1984
[To accompany S. 38]

Cong. Record Vol. 129 (1983)

Cong. Record Vol. 130 (1984)

DATES OF CONSIDERATION AND PASSAGE

Senate June 16, 1983; September 20, 1984

House April 10, September 18, 1984

The House Report (Part I, this page, Part II, page 2768) and the House Conference Report (page 2771) are set out.

HOUSE REPORT NO. 98-570, Part I

[page 1]

The Committee on Education and Labor, to whom was referred the bill (S. 38) entitled the "Longshoremen's and Harbor Workers' Compensation Act", having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

* * *

BACKGROUND AND HISTORY OF LEGISLATION

The Longshoremen's and Harbor Workers' Compensation Act (herein called, "the Longshore Act") was last amended in 1972. These current amendments were first proposed in the 97th Congress. A bill to amend the Longshore Act (H.R. 25) was introduced by Mr. Erlenborn. The Senate bill, S. 1182, was introduced on May 14, 1981, and was the subject of four days of legislative hearings in the Committee on Labor and Human Resources in the Senate. That bill was reported by the Senate Committee on July 19, 1982, and was passed by the Senate on July 27, 1982. When received by the House of Representatives, the bill was referred to the Committee on Education and Labor, and hearings were held on the measure in the Subcommittee on Labor Standards on August 17, 1982. The Labor Standards Subcommittee, working with affected constituencies, developed extensive revisions to the bill, but was unable to

* * *

[page 83]

INDIVIDUAL VIEWS OF
HON. JOHN N. ERLENBORN

Unfortunately, the Committee hurriedly approved this legislation in the final days of the first session when it had had all year to act. We are confronted with legislation substantially altered in many important ways from the bill agreed upon in the 97th Congress. Moreover, in order to move this bill quickly to conference with the Senate we are likely to proceed under suspension of the rules, barring Floor amendments to this comprehensive and controversial bill, when it would have been preferable to consider

the legislation under the regular rules so the House could work its will.

This perspective requires an explanation. In July 1982 the Senate passed S. 1182, a comprehensive revision to the Longshoremen's and Harbor Workers' Compensation Act and, itself, the product of long, arduous negotiations. House consideration should been expeditious but organized labor, which had agreed to the Senate bill, inexplicably withdrew its support. They, as well as the gentleman from California (Mr. Miller), raised innumerable objections to the Senate bill. Issues which had been resolved were reopened and new issues sprouted like June weeds. Nevertheless, an agreement was reached in December 1982 by myself, Mr. Miller, and the Senate principals only to have our late colleague, Phillip Burton, object. The agreement was stillborn.

This past June, the Senate in effect re-passed S. 1182 – as S. 38. We were told the Committee would soon turn its attention to Longshore. But the December 1982 Agreement deemed to no longer enjoy the support of the Majority although we in the Minority were willing to abide by it.

There are numerous differences between this bill and the agreement of December 1982. The Minority, nevertheless, has negotiated in good faith with the Majority over this latest series of changes – to no avail. These changes by the Majority include:

(1) Narrowing the scope of the exemption for individuals employed by a restaurant, museum, retail outlet, or marina;

(2) Striking the exemption for certain land-based commercial barge (and sundry vessels) fabrication operations;

(3) Striking statutory provision for apportioning hearing loss claims between (and among) employers;

(4) Eliminating the Conversation Committee intended to protect the assets of the Special Fund and increasing the employers' retention period to six years;

(5) Eliminating amendments concerning vocational rehabilitation which assured continued payment of benefits during rehabilitation (with a reduction for earnings), prevented premature entry of permanent total disability awards, and mandated vocational rehabilitation;

(6) Striking codification of the Supreme Court's decision holding the mere existence of a physical impairment as insufficient to trigger the Act's presumption of coverage;

(7) Altering the basis on which benefits are determined in occupational disease cases, inspired by the 9th Circuit Court of Appeals decision in *Todd Shipyards* v. *Black*, 706 F.2d 1512 (9th Cir. 1983), which raises questions concerning the ability of insurers and self-insurers adequately to reserve claims thereunder and the eligibility for benefits of retirees without a demonstrated loss in wage earning capacity; and

(8) Eliminating terms of office (and removal only for cause) for members of the Benefits Review Board, and thus laying the foundation, so its proponents hope, for politicizing the Board's membership after the 1984 elections.

These alterations are unacceptable. Unacceptable, as well, is the gloss the Majority's report places on the bill, incorporating interpretations which either were never agreed upon or even discussed. For example, the report misstates my understanding of the scope of certain exemptions, raises questions about the effect of the Committee bill's language concerning exclusivity, and suggests an unduly restrictive interpretation of the Secretary's authority to debar medical providers and claims representatives. Neither does it reflect our agreed interpretation of changes in the statute of limitations for claims filings. This failure underscores my concern about the Majority's unstated intent, through its occupational disease benefit changes, to assure benefits for retirees who are voluntarily out of the workforce and do not experience any loss in wage-earning capacity.

However, I firmly believe amendments to the Act are necessary and long overdue and, therefore, intend to support S. 38 so that these and other differences between House and Senate versions can be addressed in conference.

JOHN N. ERLENBORN.

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
Part 2

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

HEARINGS HELD IN WASHINGTON, D.C.,
ON APRIL 18, MAY 2, 3, 10, 22; JUNE 13;
JULY 12, 26; SEPTEMBER 19, 1978

Printed for the use of the Committee
on Education and Labor

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Part 2

MONDAY, MAY 22, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY,
COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The committee met, pursuant to recess, at 9:35 a.m., in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, Erlenborn, and Miller.

Staff present: Paul F. Dwyer, counsel to the subcommittee; Edith C. Baum, minority counsel for labor.

Mr. GAYDOS. The Subcommittee on Compensation, Health and Safety will come to order.

This is, for the record, a continuation of oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act. This morning the Chair, in behalf of the subcommittee, is pleased to welcome back the Assistant Secretary of Labor, Donald E. Elisburg.

You may proceed in the manner you deem best.

STATEMENT OF HON. DONALD E. ELISBURG, ASSISTANT SECRETARY OF LABOR FOR EMPLOYMENT STANDARDS, ACCOMPANIED BY GEORGE LILLY, COUNSEL, SOLICITOR'S OFFICE; JOHN STOCKER, ASSOCIATE DIRECTOR, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION; JOHN B. MUMFORD, DEPUTY ASSISTANT SECRETARY; AND RALPH M. HARTMAN, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Mr. ELISBURG. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the subcommittee:

I welcome this opportunity to appear before you today to discuss the administration of the Longshoremen's and Harbor Workers' Compensation Act (the Act). I would like to begin by describing some of the improvements that have been made in the administration of the Longshore program during the last year and a half. In

* * *

a whole ranks high in the incidence of injury. Consequently, the insurance coverage rates are relatively high for Longshore coverage. But when employers report sudden and continuing increases in their insurance premiums something is wrong. Let me give you some examples of increases in premiums for Longshore Act insurance since the 1972 amendments. Stevedoring occupations are among the highest to insure. Prior to the amendments, the rate for general stevedoring in the West Gulf area was $21 per $100 of payroll. Now the rate is 42, an increase of 100 percent. In New York, the general stevedoring rate has increased from $29 prior to 1972 to 65 now, representing a

124 percent increase. We realize that the situation is critical and could threaten the viability of the Act.

A workers' compensation program cannot work unless insurance is available to all covered employers at affordable premiums. However, the McCarran Act of 1945 (15 U.S.C. 11) prohibits the Federal Government from any control [illegible] rate regulation, or even requiring authorized insurance companies to provide coverage to all those who require it. [Illegible] view of the critical situation, however, we have initiated a study of insurance problems under the Act. The employment Standards Administration has selected a private search firm, Cooper and Company of Stamford, Connecticut, conduct an in-depth study of insurance rates and availability under this Act. The study will include an extensive survey of employers and insurance companies writing Longshore Act coverage. It is expected to be completed by this coming July and should help us ascertain the facts and extent of the Longshore Act insurance problem. The results of the study may be the basis for recommending corrective actions which employers, insurance carriers, or possibly OWCP might take. One thing that the maritime industry can do is to take further safety measures that will cut down on the number of serious injuries and deaths. Such action would be a big step toward a cutback to insurance costs.

The Department has taken steps which should have a beneficial effect upon insurance rates, while at the same time making a good deal of progress in implementing the increased benefits and protections for workers required by the 1972 amendments to the Longshore Act. Through the national training course and accountability reviews, we

have gone a long way towards achieving uniform procedures and consistency in claims adjudication throughout the country. In addition, we have established an investigative division within OWCP for pursuing possible fraudulent claims. In the next several months, the unit will become part of the newly created office of Special Investigations in the Department which was created by Secretary of Labor Marshall to investigate allegations of fraud and abuse in all programs administered by the Department.

* * *

The point I want to make generally, Mr. Chairman, about those kinds of issues, is that those amendments represented an improvement in the case of the individual injured worker. The question of whether to change any of those provisions really presents a great possibility of moving backwards with respect to the future of workers' compensation protection for many workers in the country. I know there are individual situations the subcommittee would like to discuss with us, but I wanted to give you a broad picture as to how we feel about the process of having improved benefits under the statute.

Mr. GAYDOS. Are you saying that the National Commission in its study of workers' compensation statutes approved of the landward extension under the Longshore Act?

Mr. ELISBURG. No. I don't think I talked about the Longshore Act at all. I was talking about the increase in benefits, the indexing, and those kinds of matters.

The question of coverage, I think, as Mr. Hartman points out, has been focused to the Congress by the Supreme Court about 1969 in a decision where it said the

matter of where the water's edge is was one that Congress, itself, would probably have to judge.

Mr. GAYDOS. We are talking about court decisions; is that right?

Mr. ELISBURG. In that issue. That's an issue or coverage.

With that, Mr. Chairman, that's really my summary of where we are. We would be pleased to respond to any questions the subcommittee has.

Mr. GAYDOS. May I get an example, for the record. We talked about rehabilitation in the shipping industry. What does that constitute? What is it made up of, and what form does it take?

Mr. ELISBURG. Mr. Stocker.

Mr. STOCKER. Mr. Chairman, all cases in which an injured employee is disabled for more than 2 months are referred to a rehabilitation specialist in our office for review. That person will fall –

Mr. GAYDOS. Take a welder, for example, someone with a specific trade or profession. Or take an unskilled person. How does this rehabilitation work?

We keep hearing about rehabilitation in this area and other areas. We hear that we can retrain people if we run this program properly and efficiently, and then we won't have to worry about compensation payments, because they will be back in the work force.

There is a serious doubt as to whether that concept, in a practical manner, can be applied. Very few people are

being rehabilitated. They find it better not to be rehabilitated. That is one of the accusations.

I am asking you how this works under the Act, and as a practical matter, will it produce results which will eventually solve the problem?

Can you give us an example of how it works?

Mr. STOCKER. There are two aspects of rehabilitation: We look at what can be done medically for the man in an active and aggressive way, versus merely palliative treatment. That is the first thing the specialists will consider, a positive approach to treatment.

Mr. GAYDOS. How many specialists are there?

Mr. STOCKER. We have nine scattered throughout the country.

Mr. GAYDOS. That man's case will find its way to one of these specialists?

Mr. STOCKER. It will be referred by the claims examiner or on the filing of a special rehabilitation form by the insurance carrier. They are required to file that 60 days after a man becomes totally disabled.

The specialist will contact the disabled worker at the appropriate time and try to engage him or her in becoming interested in what might be done to either return the person to the job they were doing before the accident, to place them in another type of employment they could do in their disabled condition, or to train them for some other type of work.

We have had some examples in the District of Columbia, where the present program has been operating since 1971.

We had an example of a young man who attended law school under the sponsorship of this program and was able to become a lawyer.

We have had cases –

Mr. GAYDOS. You are not citing that as a typical case?

Mr. STOCKER. It's not a typical case.

We had a laborer who went into the hairdressing business.

Mr. GAYDOS. Is that progressive or regressive?

Mr. STOCKER. I will defer answering that.

I suppose the cases where a worker goes to college are not the typical cases.

We have a former Redskin football player being rehabilitated in a business administration program. He is now in the State of Oregon, which is his home.

I think in more instances than not, we help people return to their own job or to assist them in placement in another job they can do without too much training. Where training is necessary, though, we counsel with State or private counseling services, make recommendations, and the person is put in the appropriate course. Then we follow through to see that he or she gets a job when they complete training.

Mr. MILLER. Excuse me.

Mr. GAYDOS. Go ahead.

Mr. MILLER. You have nine rehabilitation specialists?

Mr. STOCKER. Yes, we do.

Mr. MILLER. Those specialists are supposed to be concerned with both the medical rehabilitation and occupational rehabilitation is that correct?

Mr. STOCKER. Yes, Mr. Congressman.

Mr. MILLER. Suppose that coincides with the number of regional offices.

Mr. STOCKER. Some of the vocational rehab specialists serve more than one district office. For example, we have one located in Norfolk servicing Philadelphia, Baltimore, and Norfolk. We have 16 district offices, but some, as I said, rehab people service more than one office.

Mr. MILLER. What is their caseload for a year?

Mr. STOCKER. I don't have an exact figure. We can supply that for you. Would you like that information?

Mr. MILLER. You said an injured worker is to be referred to a specialist within 60 days of becoming totally disabled?

Mr. STOCKER. If the employee is still off work after 60 days, the case is referred to the specialist for initial review. Of course, if he is about to return to work, there would be no action necessary. But if it appears at that time disability will be prolonged, the rehabilitation specialist makes the determination.

Mr. MILLER. That specialist has nothing to do – I don't understand their medical role. 60 days after a traumatic injury is a long period of time.

Mr. STOCKER. That review is to determine whether a rehabilitation medical program would be feasible. There is a branch of medicine, rehabilitation medicine, which is different from just treating a man.

Mr. MILLER. I understand that. We had testimony from rehabilitative medicine, and there in terms of traumatic injuries they were talking about immediate treatment in terms of occupational return, in terms of getting the treatment to accomplish something. It's my concern that doesn't preclude, if a person has a spinal or head injuries, from intensive immediate care, because 60 days according to those doctors is a long, long time.

Mr. STOCKER. An injured employee is permitted to choose his treating physician. This is an additional review for the purpose of determining whether we can provide a more positive treatment approach than he may be getting from the physician he selected.

Mr. ELISBURG. I think that is in addition to the employee's own physician in some cases, though perhaps not enough. But there are some cases where insurance carriers are involved. Many of them do have an active rehabilitation program where they, too, would involve themselves to the extent the employee is amenable in providing rehabilitation services.

Since we have gone to the free choice of doctors, of course, the control of that medical program is no longer in the hands of the employer. There were a number of reasons why that was put in the statute. I wouldn't want to

suggest from my testimony that we were overjoyed with the whole approach that we have been able to accomplish in rehabilitation. We were starting from a point where we didn't involve ourselves very much at all because we didn't have the resources.

I think as we see how this program develops it may likely become an area in which we would like to increase our services. I think in terms of rehabilitation needs it's important for someone to get in early in dealing with the employee's injury.

Mr. MILLER. I can understand an occupational assessment I made 60 days later, but I am not sure of the role of this specialist.

Mr. ELISBURG. It's really to be a monitoring role to review cases to make sure something is being done.

Mr. MILLER. He doesn't necessarily prescribe treatment.

Mr. ELISBURG. No.

Mr. MILLER. Does he disagree with the injured worker's doctor?

Mr. HARTMAN. He as an individual doesn't. There may be reference to a specialist in a particular field. Normally, in my own personal judgment it begins with the first visit to the doctor, whether it's a major injury or minor injury. Or whether it's in intensive care or not. The 1972 amendments placed greater emphasis on rehabilitation and the supervision of medical care. This is a beginning. In my judgment, it falls short of what is necessary. I think as time goes along we will see considerable improvement.

Normal motion, a fractured wrist, does it exist or doesn't it? It can be stiff. What can be done to relieve that? Is it merely exercise? Surgery? Excision of tendons? There has to be a judgment, and, if the physician's merely giving whirlpool baths and has a wheel on the wall and says, "Turn that for 15 minutes," and, sets the time clock, is that treatment effective?

To rehabilitate, is it possible some additional surgery would help the injured? I am not thinking necessarily of always reducing the impairment. If there is a 25-percent loss of use of the left hand there may continue to be 25-percent loss of use, and rehabilitation is not necessarily designed to reduce the amount of compensation benefits a person receives. In many instances, it has that effect. It gets a man back to work.

I think we can generally agree the best rehabilitation is to have the man or woman back on the job.

Mr. MUMFORD. Rehabilitation is not mandatory. It is an option. Our function is to serve as an intermediary.

Secondly, the statute doesn't require total disability compensation continue through the rehabilitation, but the statute does provide for a small allowance. So both these factors should be noted. And obviously the change in the makeup of the work force and those covered by the Longshore Act do have some effect on our ability to successfully complete rehabilitation as often as we would like to.

Mr. GAYDOS. Is it the feeling at this time that rehabilitation, as it existed in the Act throughout the years, is working or is not?

Mr. MUMFORD. We think, Mr. Chairman, that it's working much better than it had in the past. The Congress

expressed itself very clearly, and we have seen substantial change in the performance of our rehabilitation program since the '72 amendments.

Mr. ELISBURG. I must say, Mr. Chairman, we are just getting our feet wet in this issue. The matter of rehabilitation in all our programs is one which is going to be a growing program and of growing concern as to what efforts can be made to get injured workers back to work. I think in considering where we have come from, we have come a long way, but we have a long way to go.

Mr. GAYDOS. What seems incomprehensible is that we have had some sort of rehabilitation concept in the Act since its inception, and then in '72 we just touched it – we didn't touch it too much in '72.

For all these years, we have had this concept, and it appears we are missing the boat. I am wondering if the critics who are saying we are spending too much on rehabilitation are right or wrong. I don't know.

The simple question I am trying to find an answer for is: Does the rehabilitation concept have a future? Will we be getting more benefits as a result of the concept? Will it work?

Mr. ELISBURG. I think you have to look not only at this statute but at some of the other programs Congress has enacted which make clear the interest in rehabilitation programs. The Rehabilitation Act of '73 is quite extensive in providing the programs –

Mr. GAYDOS. Take a longshoreman who is called upon to do physical work, and unfortunately, he has not had much preparation or training in any other area. He gets injured and has muscle or tissue damage – a serious,

authentic injury. Is it your idea the concept of rehabilitation should be to train him for something else in the stevedoring industry or in another field? Or another industry, I mean.

Mr. STOCKER. Among the longshoremen, and particularly in the New York area, there is a certain reluctance to go into another field of endeavor. So most of our efforts there are, I would say, not as productive as they might be in some other area where you would have a more educated population and opportunities for preparing for other types of work.

But we do screen all the cases and make a determination.

Mr. GAYDOS. Are you reluctantly saying the stevedoring business, as we know it, has its limitations?

Mr. STOCKER. It may be. In that particular area, many of the longshoremen are foreign-born. They don't have English as a language which they can function in effectively. So we do have problems there.

In an area such as California, where the level of education is higher among longshoremen, I think we have a better chance of making progress. But since this is a national Act, we feel we should make the same effort in every part of the country, and that is the direction in which we are headed.

Mr. HARTMAN. One thing, Mr. Chairman, if I may, a case of any magnitude should be evaluated by a team of specialists, not by a rehabilitation counselor, not by an orthopedist, not by a neurologist, depending on the type injury, but by a team of four, five, or six who evaluate that individual, including a psychologist, as to background,

what his motivational needs might be, what his family relationship is, where can he be placed.

Then you come to the question of whether the employer will consider, what kind of job? This is where the rehabilitation specialist comes in. He gets the report of the evaluating team. He goes to the employer. Does that employer have a job which will permit the employee to work with the residual impairment the employee has?

If they find such a job for him, will they take him back? Will the insurance carrier agree they may take him back, or suggest not because he is a potentially greater risk? Failing with the employer, do you go out on the open market? That course is far from satisfactory.

Many years ago everyone was trained as a watchmaker. That seemed to be the basic approach to rehabilitation, particularly the paraplegic. Not everyone is competent to be trained to do the average bench job, particularly if it involves handling finite items. Even though our fingers have not been injured, we are not all dextrous with our fingers. Rehabilitation means different things to many people.

Mr. MILLER. When you get to the question you asked as to longshoremen, it's not getting the longshoreman interested in getting back to work. We will have to spend more time with employers as we do with other parts of the society. How do you get the employer to understand what a light-duty job is. If you have a totally disabled worker used to doing physical labor all the time, Mr. Chairman, you do have a problem in redirecting and recommending some new opportunity for that worker. It's a commitment we have made in our society, and we have to work on it.

Since we have another classification of cases in the small boatyards and marinas, what have you found there in terms of rehabilitation? You say in New York there has been a reluctance. Have you had the type injury that requires extensive rehabilitation?

Mr. ELISBURG. The question is what experience we have had in the small boatyards with totally disabled and retraining and rehabilitation in that area. I would have to sort through the cases to determine whether we have had any in that area. I don't know, and would have to furnish you the information.

Mr. MILLER. You don't know if you have had that kind of injury requiring sustained rehabilitation?

Mr. ELISBURG. That's right.

Mr. MILLER. Are you indicating there is a distinction in terms of the approach to rehabilitation throughout the country?

Mr. ELISBURG. No. The approach has to be the same –

Mr. MILLER. I am talking about in terms of the workers' interests. Is there a difference in stevedoring in the Northwest, as opposed to New York, as opposed to the Gulf Coast?

Mr. STOCKER. May I answer?

Mr. ELISBURG. Yes.

Mr. STOCKER. I would say there are differences in workers' attitudes in different parts of the country, and what their expectations are as to going into another type of work.

We have had a number – in fact, the highest number for a district office rehabilitated during 1977 was the Dallas region, which includes New Orleans and Texas. We had 21 who completed rehabilitation, a training course. We had 21 also in the Seattle area. We had only three in New York, which doesn't speak too well by comparison, but this is those who completed training. It doesn't mean we don't provide the other services.

Mr. MILLER. When you say three in New York, you had three people who completed training?

Mr. ELISBURG. Yes.

Mr. MILLER. Out of how many were referred to a specialist.

Mr. STOCKER. Well, there were about 450 which were initially screened and went through some stage of consideration by the rehabilitation specialist.

Mr. MILLER. And three people completed training out of 450?

Mr. STOCKER. I should point out that a person who goes through a training course, that would involve perhaps 2 to 3 years. So there will be a time lag before the full effect of those specialists which we have on board now will be felt.

Part of that rehabilitation was handled in the past, as Mr. Elisburg indicated, on a part-time basis by the Federal Employees' Compensation staff.

Mr. MILLER. These other 400 – were they in various stages of compensation, or did they say they didn't want any, or where are they in the system?

Mr. STOCKER. We can provide that information for you.

Mr. ELISBURG. Some of each of the conditions you mentioned. [The information referred to follows:]

LHWCA Rehabilitation Program
Employees in Small Boat Industry
FY 1977 and 1978

There are no injured workers from the small boat industry in LHWCA rehabilitation programs.

Injured Workers in LHWCA Rehabilitation Programs in New York Compensation District During FY 1978

I. Injured workers currently in training programs in the New York Compensation district:

1. A 48 year old shipyard electrician, with aggrevated cervical arthritis in a 21 month course to become an arthitectural technician.

2. A 24 year old shipyard welder, with a herniated lumbar sacral disc in a 10 month course to become a commercial artist.

3. A 27 year old shipyard welder, with a loss of one eye and hand limitations in a 48 month course in business administration for management.

4. A 47 year old shipyard rigger, with shoulder, thigh and knee limitations in a 7 month course in jewelry making.

5. A 22 year old laborer, with knee limitations in a 7 month course in major appliance repair.

II. Injured workers in New York district office who left training programs before completion during FY 1978:

1. A 49 year old ship lasher, having a loss of one eye, interrupted a 10 month accounting clerk program because of further medical problems.

2. A 23 year old shipfitter, with neck, shoulder and knee limitations interrupted an 8 month photographer program because of further medical problems.

3. A 41 year old ship structural fabricator, with hip limitations interrupted a 24 month engineering aid program because of further medical problems.

4. A 36 year old longshoremen, with back, neck and shoulder limitations interrupted a 9 month jewelry making program because of personal problems.

5. A 33 year old shipfitter, with back and knee limitations interrupted a 10 month typewriter repair program because of personal problems.

III. Injured workers in New York Compensation district rehabilitated by placement through the LHWCA rehabilitation program during FY 1978:

1. A 36 year old ship painter, with back and hip limitations, was selectively placed in light duty painting position.

2. A 51 year old ship rigger, with back and hand limitations, was selectively placed as a crane signal person.

3. A 36 year old ship carpenter, with knee limitations, was selectively placed in a light duty carpentry shop position.

4. A 52 year old shipfitter, with back limitations, was selectively placed in a light duty pipe ship position.

5. A 43 year old ship welder, with back and knee limitations, was selectively placed as a stock clerk.

6. A 44 year old yard man, with foot limitations, was selectively placed as a Hi-Lo driver.

7. A 27 year old ship pipe fitter, with back and knee limitations, was selectively placed in a light duty pipefitter position.

The LHWCA Rehabilitation Process

I. Purpose: To provide all eligible injured workers early referral to and delivery of needed medical or vocational rehabilitation programs.

II. Screening: Many injured workers enter the process who subsequently are found not eligible or not in need of programs. The nationwide statistics for screening in FY 1978 indicate the following:

1. 40 of every 100 injured workers being compensated are referred to a Longshore Rehabilitation Specialist for the determination of eligibility and need. 33 of the 40 are eliminated for one of the following reasons:

   a. No permanent disability.

   b. Return to work without the need for a LHWCA rehabilitation program.

c. Refuses LHWCA rehabilitation services.

d. The rehabilitation specialist determines that a rehabilitation program will not help the injured worker return to work.

2. 7 of every 40 injured workers referred to the Longshore Rehabilitation Specialist are referred by the specialist for testing and evaluation to develop a rehabilitation program. 4 of the 7 are eliminated for one of the following reasons:

a. Lack of improvement (pain) or exacerbation of medical condition

b. Was able to return to work without DOL help

c. Case settled

d. Refuse to change unrealistic vocational goal

e. Drops out and refuses further contact

f. Decides to seek employment without DOL help

g. Does not keep appointments

h. Death

3. 3 of every 7 injured workers tested and evaluated enter medical, training or placement rehabilitation programs. 1 and a fraction of the 3 are not rehabilitated for one of the following reasons:

a. Exacerbation of medical condition

b. Absenteeism

c. Drops out and refuses further contact

d. Will not change unrealistic expectations about new job

e. Loses interest

f. Develops family problems and refuses help

g. Develops educational problems and refuses help

h. Returns to a job that will cause further medical problems

i. Death

4. 1 and a fraction of every 3 injured workers who enter medical, training or placement rehabilitation programs are rehabilitated. An analysis of those rehabilitated in FY 1978 indicates the following:

A. 56% were in training programs

(1) 59% completed training

(2) The average time of a completed training program was 11 months

(3) 60% were placed in the occupation trained. The occupations were the following: blue print reader; clerk-general, typist, payroll and pricing; draftperson; electronics assembling; heavy equipment maintenance foreman; instrument repair-person; landscaper; mechanic – automobile, generator and starter, motocycle, outboard/inboard, and small engine; police officer; salesperson – general,

and real estate; tailor; technician – electronics, orthodontic, and television; warehouse supervisor; and welder.

(4) 37% were placed in other than the occupational trained. The occupations were the following: administrative assistant, carpenter, change collector, cook, counterperson, crane operator, draftsperson, furniture serviceperson, manager – fast food, painter, salesperson, small boat builder and truck driver.

B. 44% were in placement only programs

(1) 75% were placed with new employers

(2) 83% were placed in a new occupation

(3) Injured workers in placement only programs were rehabilitated in the following occupations: body and fender repair person; caretaker; clerk – administrative, stock, store, and tool room; custodian; dispatcher; driver – chauffeur, bus, hi-lo, and truck; electrician; mold loft helper; painter; pipe fitter; salesperson – insurance, and store; seamstress; security guard; and steam-cleaner.

III. Summary: For every 40 injured workers referred to the Longshore Rehabilitation Specialist, 3 enter rehabilitation programs and 1 and a fraction are rehabilitated.

See Exhibits 3 and 4 for FY 1976 and 1977 statistics on injured workers who start and finish LHWCA rehabilitation programs.

Mr. GAYDOS. Mr. Erlenborn.

Mr. ERLENBORN. Mr. Secretary, during the hearings and today as well, there has been reference to the 1972 amendments. From your position as a member of the Senate committee staff when those amendments were considered, I believe you are able to give us a unique insight which other Secretaries may not be able to do.

During the consideration of the '72 amendments, there never was any discussion in the hearings, nor, as I understand it, were there any provisions in the House and Senate bills as introduced, of unrelated death benefits.

Have you any knowledge as to how that provision got into the final legislation?

Mr. ELISBURG. I would want to review the legislative history. I don't have any specific recollection, other than it obviously was one of the proposals being discussed by the members of the committee.

Mr. ERLENBORN. I was not active in that legislation, but I understand there was a House bill and a Senate bill, but there was no conference. Is that correct?

Mr. ELISBURG. I believe that's correct.

Mr. ERLENBORN. There was agreement between the managers, House and Senate, but no actual conference?

Mr. ELISBURG. I believe that's correct.

Mr. ERLENBORN. The bill that finally passed was substantially the Senate version of the legislation, was it not?

Mr. ELISBURG. If I won't get in trouble, I guess the answer is yes.

Mr. ERLENBORN. Some witnesses have claimed that employers are unable to obtain an independent physical examination of claimants. Is that true? What is the Department of Labor's position on that?

Mr. ELISBURG. We have a process for an independent medical examination.

Mr. Stocker will you explain how it works?

Mr. STOCKER. Yes. Mr. Congressman, the Act requires each employee to submit to an examination by a physician of the employer's choice, if requested. Should he refuse, he may not be entitled to compensation for any period he declines to undergo such examination.

Mr. ERLENBORN. If any witness makes that claim again, we can tell them under the Act the employer has that right and that will be enforced by the Department of Labor?

Mr. STOCKER. Yes. If we are advised in any instance that an employer wishes to have a claimant examined and the claimant refuses, we would like for them to advise our office.

As a matter of fact, they should advise our district office they are going to have such examination.

Mr. ERLENBORN. Talking about the physicians' examinations, can you tell me why the panel of physicians was abandoned in 1972? Had there been troubles with the system?

Mr. ELISBURG. Yes. I think there was testimony and concern that the physicians were largely selected – they were a panel selected by the employers – and there was either a real or perceived feeling on the part of the injured workers that they were not receiving fair medical examination. So the Congressional judgment was to authorize the employee's choice of physician. I might say that is within some limits.

For example, taking an extreme case, perhaps, an injured worker goes to an orthopedist for a dermatitis condition. If you get to medical specialties, the Department has the responsibility to supervise the medical care. There would be that kind of limitation.

Our basic view has been, however, within that kind of function, to the extent the physician is licensed within the State, that the employee has the right to use that physician.

There may be some other extreme cases.

Mr. ERLENBORN. That's the only basic limitation?

Mr. ELISBURG. Yes, sir, the licensing, the specialty, and conceivably the location. I don't know whether that ever comes up.

Mr. ERLENBORN. Witnesses have also stated in some cases there is no incentive to return to work or to be rehabilitated, since in many cases the claimant's after-tax income is higher with compensation than when he was working.

Have you any facts or figures as to whether this is true and, if so, to what extent?

Mr. ELISBURG. The law provides for two-thirds of your wage, and no matter how highly paid you are, you never get more than two-thirds of your wage.

I suppose it's conceivable there would be certain situations where they would have more money coming in than they would if they paid taxes on it. I don't think that it too likely for most workers, and it certainly is not a novel approach to the workers' compensation problems. The Longshore Act doesn't do anything more than provide the basic benefit percentage that 50 other statutes in the United States provide. Two-thirds is the accepted level.

Mr. ERLENBORN. Is that generally the level in all States?

Mr. ELISBURG. Virtually all, I think, are two-thirds. The difference is what you get as a maximum benefit. But for the typical industrial worker – well, for everyone – it would be two-thirds. The maximums don't come into play until you come to the higher paid workers.

Mr. ERLENBORN. Witnesses have also claimed employers are required to pay all lost income arising from an injury. For instance, an employee works not only in covered work as a longshoreman, but part time as a house painter, and his injury prohibits employment in the noncovered part-time work as well. The employer is required to compensate the employee for the outside work as well as the covered work. Is that correct?

Mr. ELISBURG. The question is, when you pay benefits – you are paying the average weekly wages – do you go back to the average weekly earnings of the employee? To the extent they were doing something else, that would be

included in the mix. But in no event would they get more than two-thirds of the actual wage.

Mr. ERLENBORN. Let us say he is a very successful house painter, makes a lot of money at it. Suppose his income from that might exceed what he was earning in covered income.

Mr. ELISBURG. I suppose anything is possible.

Mr. ERLENBORN. But generally the concept is the employer is insuring the income, not just the covered wages, but the income of the employee from whatever source?

Mr. ELISBURG. I believe, Congressman, that is true in most other jurisdictions.

Mr. ERLENBORN. Is that true in State workers' compensation?

Mr. LILLY. Section 10(c) of the Act includes the phrase "in which he was working or other employment of such employee."

So actually, if you go to section 10(c) of the Act in order to determine the wage rate at which he may be compensated, yes, you may include other employment to fairly arrive at his average weekly rate.

Mr. ELISBURG. I believe it is correct; many other State compensation laws provide the same basis. I would be glad to provide that information.

Mr. ERLENBORN. Yes; I think that would be helpful for the record.

Mr. GAYDOS. Submit that along with other documentation. [The information referred to follows:]

* * *

U.S. Department of Labor
Employment Standards Administration
Division of State Workers' Compensation Standards
July 1978

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S.

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Alabama	66 ⅔	$48 – 25 percent of State's average weekly wage, or average wage if less.	$128 – 66 ⅔ percent of State's average weekly wage	300 weeks	
Alaska	66 ⅔	$65 or average wage if less.	$607.85 – 133.3 percent of the State's average weekly wage[1]	Duration of disability	
Arizona	66 ⅔	$30 if worker is 21 years of age or over, plus $2.30 for total dependents.	$153.85, plus $2.30 for total dependants.	Duration of disability	
Arkansas	66 ⅔	$15	$87.50	450 weeks	$39,375
California	66 ⅔	$49	$154	240 weeks	
Colorado	66 ⅔	No statutory minimum.	$175.60 – 80 percent of State's average weekly wage[2]	Duration of disability	(2)
Connecticut	66 ⅔	$20[3]	$147 – 66 ⅔ percent of State's average weekly wage.[3]	Duration of disability	
Delaware	66 ⅔	$51.49 – 22 ⅔ percent of the State's average weekly wage, or actual wage if less.	$154.50 – 66 ⅔ percent of State's average weekly wage.	Duration of disability	
District of Columbia	66 ⅔	$91.81 – 50 percent of national average weekly wage,[4] or worker's actual wage if less.	$367.22 – 200 percent of national average weekly wage.[4]	Duration of disability	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Florida	60	$20, or actual wage if less.	$126 – 66 ⅔ percent of State's average weekly wage[5]	350 weeks	
Georgia	66 ⅔	$25 or actual wage if less.	$110	Duration of disability	
Hawaii	66 ⅔	$47 – 25 percent of applicable maximum, or average wage if less.[6]	$189 – 100 percent of State's average weekly wage.	Duration of disability	
Idaho	'60	$82.35 – 45 percent of the State's average weekly wage.[3]	$109.80 to $164.70 – 60 to 90 percent of the State's average weekly wage[3]	52 weeks; thereafter 60 percent of the state's average weekly wage, for duration of disability	(4)
Illinois	66 ⅔	$100.90 to $124.30[3], or average wage if less.	$321.30 – 133⅓ percent of State's average weekly wage.	Duration of disability	
Indiana	66 ⅔	$50, or average wage if less.	$120	500 weeks	$60,000
Iowa	[7]80	$48.01, or actual wage if less	$265 – 133 ⅓ percent of State's average weekly wage.[7]	Duration of disability	
Kansas	[8]66 ⅔	$7	$129.06 – 66 ⅔ percent of State's average weekly wage.[8]	Duration of disability	$50,000
Kentucky	66 ⅔	$37 – 20 percent of the State's average weekly wage.	$112 – 60 percent of the State's average weekly wage.	Duration of disability	
Louisiana	66 ⅔	$39 – 20 percent of State's average Weekly wage, or actual wage if less.	$130 – 66 ⅔ percent of State's average weekly wage.	Duration of disability	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Maine	[9] 66 ⅔	$25	$231.72 – 133 ⅓ percent of State's average weekly wage[9]	Duration of disability	
Maryland	66 ⅔	$25, or actual wage if less.	$202 – 100 percent of State's average weekly wage.	Duration of disability	
Massachusetts	66 ⅔	$30, or average wage if less, but not less than $15 if normal working hours are 15 or more.[10]	$150[10]	Duration of disability	[10] $37,500
Michigan	66 ⅔	$105 to $120[3]	$142 to $171[3 11]	Duration of disability	
Minnesota	66 ⅔	$98.50 – 50 percent of State's average weekly wage, or employee's actual wage if less, but not less than 20 percent of State's average weekly wage.	$197 – 100 percent of State's average weekly wage.	Duration of disability	
Mississippi	66 ⅔	$25	$91	450 weeks	$40,950
Missouri	66 ⅔	$16, or actual wage if less.	$155	400 weeks	
Montana	66 ⅔	No statutory minimum.	$188 – 100 percent of State's average weekly wage.[13]	Duration of disability	
Nebraska	66 ⅔	$49, or actual wage if less.	$155	Duration of disability	
Nevada	66 ⅔	No statutory minimum.	$212.02 weekly – 100 percent of State's average monthly wage.	Duration of disability	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
New Hampshire.....	([13])	$30, or average wage if less.	$180 – 100 percent of State's average weekly wage.[13]	Duration of disability....	
New Jersey.....	66 ⅔	$15.....	$146 – 66 ⅔ percent of State's average weekly wage.	300 weeks.....	
New Mexico.....	66 ⅔	$36, or actual wage if less.	$172.46 – 100 percent of State's average weekly wage.....	600 weeks	([14])
New York	66 ⅔	$30, or actual wage if less.	$180[15]	Duration of disability.....	
North Carolina	66 ⅔	$20.....	$168 – 100 percent of State's average weekly wage.	Duration of disability....	
North Dakota.....	66 ⅔	$108 – 60 percent of State's average weekly wage, or employee's actual wage if less.	$1.00 – 100 percent of State's average weekly wage, plus $5 for each dependent child, but not to extend workers' net wage after taxes and Social Security.	Duration of disability.....	
Ohio.....	66 ⅔	$72 – 33 ⅓ percent of State's average weekly wage, or actual wage if less.	$216 – 100 percent of State's average weekly wage.	Duration of disability.....	
Oklahoma.....	66 ⅔	$30, or actual wage if less.	$121 – 66 ⅔ percent of State's average weekly wage.	300 weeks, may be extended to 500 weeks.	
Oregon.....	66 ⅔	$50, or 90 percent of actual wage if less.	$226.26 – 100 percent of State's average weekly wage.	Duration of disability.....	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Pennsylvania	66 ⅔	$106.50 – 50 percent of State's average weekly wage, with absolute minimum of $71 – one-third maximum weekly rate.	$213 – 100 percent of State's average weekly wage.	Duration of disability	
Puerto Rico	66 ⅔	$10	$45	312 weeks	
Rhode Island	66 ⅔	$30	$176 – 100 percent of State's average weekly wage, plus $6 for each dependent; aggregate not to exceed 80 percent of workers' average weekly wage.[16]	Duration of disability.[16]	([15])
South Carolina	66 ⅔	$25	$178 – 100 percent of State's average weekly wage.	500 weeks	
South Dakota	66 ⅔	$78 – one-half of maximum weekly benefits, or average weekly wage less.	$155 – 94 percent of State's average weekly wage.[17]	Duration of disability	
Tennessee	66 ⅔	$15	$100	Duration of disability	$40,000
Texas	66 ⅔	$19[18]	$91[18]	401 weeks	
Utah	66 ⅔	$45 to $70[3]	$197 – 100 percent of State's average weekly wage.	312 weeks	
Vermont	66 ⅔	$91 – 50 percent of State's average weekly wage, plus $5 for each dependent under 21, or average wage if less.	$181 – 100 percent of State's average weekly wage, plus $5 for each dependent under 21.	Duration of disability	

See footnotes at end of table.

Table 7. Benefits for Temporary Total Disability Provided by Workers' Compensation Statutes in the U.S. (Cont.)

Jurisdiction	Maximum percentage of employee's wages	Payments per Week		Maximum period	Total maximum stated in law
		Minimum	Maximum		
Virginia	66 ⅔	$44.75 – 25 percent of State's average weekly wage, or employee's actual wage if less.	$187 – 100 percent of State's average weekly wage.	500 weeks	([19])
Washington	[5]60-75	$42.69 to $81.23[7]	$175.30 – 75 percent of state's average wage, adjusted annually.[20]	Duration of disability	
West Virginia	70	$76.67 – 33 ⅓ percent of States average weekly wage.	$224 – 100 percent of State's average weekly wage.	200 weeks	
Wisconsin	66 ⅔	$30	$202 – 100 percent of the State's average weekly wage.	Duration of disability	
Wyoming	66 ⅔	$43	$211.15 weekly – 100 percent of State's average monthly wage.	Duration of disability	
*United States FECA	[23]66 ⅔-75	$101.47,[21] or actual wage if less.	$678.25[21]	Duration of disability	
LS/HWCA	66 ⅔	$91.81 – 50 percent of national average weekly wage, or worker's actual wage if less.[4]	$367.22 – 200 percent of national average weekly wage.[4]	Duration of disability	

See footnotes at end of table.

* FECA means Federal Employee' Compensation Act (5 U.S.C. 8101-8150), LS/HWCA means Longshoreman's and Harbor Workers' Compensation Act (33 U.S.C. 901-950).

[1] *Alaska*: Effective January 1, 1978, maximum weekly benefits will be 166.6 percent of the State's average weekly wage; and January 1, 1981, 200 percent. If periodic retirement of survivors' benefits are payable under the Federal OASDI, the workers' compensation weekly benefits shall be reduced by one-half the amount of such Federal benefit for each week. If Federal OASDI benefits are payable for a work-related injury for which a workers' compensation claim has been filed, the workers' compensation benefits shall be offset by an amount by which the sum of the weekly Federal and State workers' compensation benefits exceed 80 percent of the employees' average weekly wages at time of the injury.

[2] *Colorado*: Workers' compensation weekly benefits shall be reduced (but not below 0) by an amount equal to any periodic disability benefits granted pursuant to either a Federal or other State's workers' compensation law or an employer pension plan.

[3] According to number of dependents. In Washington, according to marital status and number of dependents. In Connecticut, $10 for each dependent child under 18, up to 50 percent of the basic weekly benefit, total benefits not to exceed 75 percent of the employee's average weekly wage. In Idaho, increased by 7 percent of currently applicable average weekly State wage for each child up to 5 children. In Utah, $5 for dependent spouse and each dependent child up to 4, but not to exceed 100 percent of State's average weekly wage.

[4] *D.C. and LS/HWCA*: "National average weekly wage," as determined by the Secretary of Labor, shall be based on the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

[5] *Florida*: If periodic disability benefits are payable to the worker under the Federal OASDI, the worker's compensation benefits and the Federal payment shall not exceed 80 percent of the employee's average weekly wage. Said offset shall not be applicable when worker reaches age of 62. In addition, weekly benefits payable under the unemployment compensation law of any State are offset against workers' compensation benefits.

[6] *Hawaii*: Law states the minimum weekly benefit shall be $38, or 25 percent of the applicable maximum weekly benefit, rounded to the percent dollar, whichever is higher.

[7] *Iowa*: Maximum percentage of wages based on employee's average weekly spendable earnings. Effective July 1, 1979, maximum weekly benefits will be 166 ⅔ percent of the State's average weekly wages and beginning July 1, 1981, 200 percent.

[8] *Kansas*: Maximum percentage of wages based on employee's average gross weekly wage.

[9] *Maine*: maximum percentage of wages based on employee's average gross weekly wage. Effective July 1, 1979, maximum weekly benefits will be 166 ⅔ percent of the State's average weekly wages and July 1, 1981, 200 percent.

[10] *Massachusetts*: Plus a weekly allowance of $6 for each total dependent, but the aggregate shall not exceed the worker's average weekly wage. The total maximum for temporary total and permanent partial disability is $37,500. Effective October 1, 1978, the maximum weekly benefit will change to the State's average weekly wage; the minimum weekly increase to $40 and the absolute minimum to $20; the total maximum will increase to $45,000.

[11] *Michigan*: The maximum benefit rate is adjusted annually on the basis of a $1 increase or decrease for each $1.50 increase or decrease in the State's average weekly wage.

[12] *Montana*: If periodic disability benefits are payable to the worker under the Federal OASDI, the worker's compensation weekly benefits shall be reduced (but not below 0) by an amount approximating one-half such Federal benefits for such w[illegible]k.

[13] *New Hampshire*: Benefits set in accordance with a "wage and compensation schedule" up to average weekly wage of $138 (maximum benefit $92). If the employee's average weekly wage is over $138, compensation shall be 66 ⅔ percent of such wage, not to exceed 100 percent of State's average weekly wage rounded to the nearest dollar.

[14] *New Mexico*: The total maximum is an amount equal to 600 multiplied by the maximum weekly compensation payable at the time of injury.

[15] *New York*: Effective January 1, 1979, maximum weekly compensation will be $215.

[16] *Rhode Island*: After 500 weeks, or after $32,500 has been paid, payments to be made from second injury fund for period of disability.

[17] *South Dakota*: Effective July 1, 1979, maximum weekly benefits will be 100 percent of State's average weekly wage, computed to the next higher multiple of $1.

[18] *Texas*: Each cumulative $10 increase in the average weekly wage for manufacturing production workers will increase the maximum weekly benefit by $7 per week, and the minimum by $1 per week.

[19] *Virginia*: Total maximum amount payable shall be the result obtained by multiplying the State's average weekly wage for the applicable year by 500.

[20] *Washington*: For injuries occurring prior to July 1, 1971, a specified formula provides for an annual adjustment of benefits.

[21] *Federal employees*: Based on 75 percent of the pay of specified grade levels in the Federal civil result.

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Part 2

WEDNESDAY, JULY 12, 1978

House of Representatives,
Subcommittee on Compensation, Health and Safety,
Committee on Education and Labor,
Washington, D.C.

The committee met, pursuant to recess, at 10:30 a.m., in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, Murphy, Cornell, Zeferetti, Myers, Miller, and Buchanan.

Staff present: Paul F. Dwyer, subcommittee counsel, and Edith C. Baum, minority counsel for labor.

Mr. Gaydos. The Subcommittee on Compensation, Health and Safety of the Education and Labor Committee will come to order.

We have visiting us this morning some of our colleagues who are not on the committee but who have a very sincere interest in the subject matter we are about to continue hearings on – Mrs. Boggs from Louisiana, who has been very active since the hearings we had in her district in the State of Louisiana. I believe she has some of her people here who are interested in this matter. It would be my pleasure on behalf of the committee to recognize our colleague, Mrs. Boggs.

STATEMENT OF HON. LINDY (MRS. HALE) BOGGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mrs. Boggs. Thank you, Mr. Chairman. Thank you very much for holding these hearings and for your continued interest in a matter of great concern to not only our area of the state but to the entire state of Louisiana and to the nation.

I am very hopefully that the testimony that will be given here today will fall on receptive ears and that we will be able, working together, to do something about the situation, particularly in regard to the high insurance rates and the difficulty in obtaining insurance

* * *

Mr. McKAY, Mr. Niles.

[The prepared statement of Stewart Niles, Jr., follows:]

STATEMENT OF STEWART E. NILES, JR. SPECIAL COUNSEL FOR AMERICAN WATERWAYS SHIPYARD COMMITTEE OF THE AMERICAN WATERWAYS OPERATORS

Mr. Chairman, Members of the Committee:

I.

Introduction

My name is Stewart E. Niles, Jr. I am a partner in the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, of New Orleans, Louisiana. It has been my honor to have previously testified before this Subcommittee in Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act. I appear before you today as

special counsel for the American Waterways Shipyard Committee.

The American Waterways Operators (AWO) is a national trade association of domestic marine transportation founded in 1944. The AWO is comprised predominantly of tugboat and barge operators who service this country nationwide. The American Waterways Shipyard Committee (AWSC) is, as its name suggests, a committee of 51 shipyards varying from small to intermediate in size. The AWSC was founded in 1976, primarily in response to the disastrous effects of the 1972 amendments of the LHWCA on its members.

II.

Economic Impact of 1972 Amendments

The 1972 Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act has had particularly adverse impact upon small to intermediate shipyards. This continuing impact has had far-reaching effects, including loss of jobs and loss of contracts.

Small to intermediate shipyards have insufficient resources to risk a program of self insurance. Hence, virtually all such shipyards are forced to obtain insurance coverage. Review of the insurance premiums charged to such shipyards over an eight-year period is revealing.

A. Increase In Wages Compared To Increase In LHWCA Rates.

Increase in LHWCA insurance rates has far outdistanced the increase in wages for the comparable period of

time. In 1976, the American Waterways Shipyard Committee conducted a survey making such comparison. Table I reflects the results of some of the shipyard responses. In 1976, shipyard wages had increased from approximately 150-190 percent over the year 1968. Meanwhile, by 1976, LHWCA compensation rates had generally risen from 250-500 percent, with many shipyards reporting increases substantially in excess thereof. Moreover, further review of Table I reveals that LHWCA compensation rates remained generally static between 1968 and 1971.

* * *

Benefits are not awarded as a wage replacement system. Award or compensation for most injuries comes under the provisions of §8(c)(1-20), commonly referred to as "scheduled benefits". However, where an employee has an actual loss of earnings which is below his average weekly wage at the time of his accident, §8(c)(21) provides that the employer shall pay two-thirds of such actual loss. However, this provision has been liberally interpreted by the Benefits Review Board, and claimants are receiving awards under §8(c)(21) when the employee has not sustained actual loss of earnings. This Committee should consider an amendment which would provide that an employee could receive an award under §8(c)(21) if he sustains an actual loss of wages; thus, an employee's earning capacity would not be less than his actual earned wages.

The LHWCA does not contain incentives for an employee to return to work. This Committee should undertake revision to provide for the coordination of benefits from all sources. An injured employee should be provided an adequate remedy; however, the LHWCA

should not be a retirement system. Positive incentives for a recipient to return to work must be established.

The LHWCA must be amended to promote an employee's participation in rehabilitation.

Death benefits for death unrelated to employment should be removed from the Act. An employer should not be compelled to pay a death benefit unless an employee dies from causes related to the employment. If this Committee believes all workmen who die from causes unrelated to employment should receive compensation under the LHWCA, these costs should be borne by the populace as a whole.

The annual escalation clause should be fixed. It is impossible for employers, self-insurers and insurance companies to predict the ultimate cost impact of compensation for recipients entitled to receive an annual adjustment under the escalation clause.

The Act should be amended to confirm that death benefits are subject to the maximum and minimum limitations of the Act. Through an apparent oversight, the 1972 Amendments failed to include death benefits in the maximum limitation provisions.

The test for permanent total disability should be clarified. The Benefits Review Board has allowed employees to receive benefits for permanent total disability although the employee may be actually employed. An employee who is capable of gainful employment or who is actually engaged in gainful employment should not fall within this classification.

This Committee should Assure that the Department of Labor follows clear Congressional mandate in the

application of §8(f), Injury Increasing Disability. If an employee has a pre-existing disability and the disability is worsened, the employer pays compensation pursuant to §8(f). Although

* * *

BULLETIN

California Workers' Compensation Institute

1111 Broadway #2350, Oakland, CA 94607
(510) 663-1063 www.cwci.org

* * *

Institute Bulletins are available on the Member/Subscriber page of the CWCI website (http://www.cwci.org). The public also may visit the website to access additional information.

Vocational Rehabilitation

- Statutory authorization and structure repealed for dates of injury o/a 1/1/ 2004 [Labor Code § 139.5 & §§ 4635-4647]
- New Labor Code § 139.5 for dates of injury o/a 2004 provides for a Supplemental Job Displacement Benefit to Injured Workers who:

  Sustain permanent partial disability

  Do not return to work for the at-injury employer within 60 days
- The benefit will be a nontransferable voucher for education-related costs at state approved and accredited schools
- The amount of the benefit will be up to:

Voucher Amount	Permanent Partial Disability
$4,000.00	Less than 15%
$6,000.00	15%-25%
$8,000.00	26%-49%
$10,000.00	50%-99%

- Up to 10% of the voucher may be used for vocational or return to work counseling
- Within 10 days of the last TD payment, the employer is to send a notice of rights re: Supplemental Job Displacement Benefit to the injured worker via certified mail
- The new Labor Code § 139.5 language is restated in Labor Code § 4658.5, plus the Administrative Directory is to devise a notice and adopt regulations regarding payment
- The employer shall not be liable for the Supplemental Job Displacement Benefit if either of the following occur within 30 days from termination of TD
    - The employer offers and the employee rejects or fails to accept modified work lasting at least 12 months
    - The employer offers and the employee rejects or fails to accept alternative work meeting the following criteria
        - The employee has the ability to perform the essential functions
        - It is a regular position lasting at least 12 months
        - It offers wages/compensation within 15% of pre-injury earnings

- The location is within a reasonable distance from the employee's home at time of injury [Labor Code §4658.6]

* * *

SENATE REPORT ON CONFERENCE REPORT ON S. 38, LONGSHOREMEN AND HARBOR WORKER'S COMPENSATION ACT AMENDMENTS OF 1984 (SEPTEMBER 20, 1984)

LONGSHOREMEN AND LONGSHORE AND HARBOR WORKERS COMPENSATION ACT AMENDMENT – CONFERENCE REPORT

Mr. NICKLES, Mr. President, on May 14, 1981. S. 1182, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act was first introduced by myself with Senator Nunn cosponsoring. Since that time, the Senate Labor Subcommittee, which I chair, has held 4 days of hearings and the bill has undergone any number of rewritings. We thought that one compromise would, become public law at the end of the 97th Congress. That did not happen.

At the beginning of the 98th Congress. I reintroduced amendments to the Longhore Act as S. 38, I am pleased that a compromise version is finally out of conference, has passed the House, and is before the Senate for a vote today. In my opinion, this compromise, taken as a whole, is worthy of final passage and provides many needed reforms to the Longshore Act. There are some provisions which, taken alone, cause me some philosophical problems. These concerns, however, are greatly outweighed by the benefits in the entire package.

* * *

Mr. HATCH. Mr. President, it is with a great sense of accomplishment and satisfaction that I join Senator NICKLES in urging the adopting of this conference report to S. 38 – a bill which I had the privilege of cosponsoring.

This measure is the product of literally a decade of intense debate, close scrutiny, and hard negotiation.

It is not the handiwork of a select few, fashioned during some midnight hour. Many people contributed to the development of this bill, some of whom deserve special recognition. Senator NICKLES is to be commended for his diligent pursuit of these amendments. As a freshman Senator 3½ years ago, he tackled the Longshore Act as one of his first issues. And despite the disappointment of the 97th Congress, he pressed ahead in the 98th Congress for reform. As students of geography will attest, Senator Nickles' home State of Oklahoma does not have many deep water ports and thus his State was more of an indirect, rather than direct, concern over the Longshore Act. Some might therefore have wondered whether after the discouragements of the 97th Congress, he should have turned his attention to interests closer to home. Yet, in mark of true leadership, as chairman of the Labor Subcommittee, he pressed ahead in this Congress.

I would also like to commend Senator KENNEDY, whose support of a consensus bill in the Senate provided a great boast to the legislation. Senator NUNN and Senator ROTH are deserving of recognition for their early work on the Permanent Subcommittee on Investigations. Their aggressive and thorough investigation of waterfront corruption brought to light the manner in which the current law was being abused by corrupt individuals. Their recommendations for enacting more stringent sanctions were invaluable contributions, and the conference report contains many of their recommendations.

I acknowledge also the tremendous contributions of Representative MILLER and Representative ERLENBORN

who led the House conferees. It is undisputed that without their dedication, and the tireless and highly professional work of their staffs, there would be no Longshore Amendments of 1984.

Because the legislation was so technical and complicated, the conferees had to rely heavily upon the assistance of the Department of Labor as well as the Office of Legislative Counsel. Among those who deserve commendation are Ms. Susan Meisinger, Mr. Cornelius Donoghue, Mr. Peter D. Galvin, Mr. Larry Rogers, Mr. Neil Monotone, Mr. Irwin M. Wolkow, Mr. James Demarce, Ms. June Robinson, Mr. Carvin Cook, Judge Robert L. Ramsey, and Ms. Sydnee Schwartz. Also I express my thanks to Mr. Steven Cope in the Office of Legislative Counsel, who oversaw the final crafting of the statutory language. Finally, I would like to pay tribute to Mr. Robert Collyer, former Deputy Under Secretary of Labor for Employment Standards Administration, whose early leadership and contribution were instrumental in developing this measure.

The Longshore Act is like other workers' compensation laws in that it is not static. It is a dynamic one, continually evolving. The Congress, of course, has established the statutory framework, enunciating the major policy objectives toward compensating work-related injuries and deaths. However, the courts and the Department of Labor interpret and administer this law, and they must continually apply this law to unique situations which Congress did not envision. In many instances, the results are in keeping with congressional intent and purpose. But in other instances this interstitial lawmaking is clearly out of bounds and is disruptive of the consensus reached by employer and employee interest groups. In addition, it

must be candidly acknowledged that Congress itself often sows the seeds for future legislative reform. The 1972 amendments are a case in point. Although to its credit it solved many problems, its craftsmanship has prompted Chief Justice Burger to observe that the act was "about as unclear as any statute could conceivable be * * * ". The stage is thus set for congressional action when the collective product of judicial and administrative action finally activates a broad spectrum of interest groups to seek legislative change.

The Longshore Act does not lend itself to amendment easily or often. Like other labor laws, the act has been forged in the heat of political controversy, between the inherently adversarial forces of business and labor. It embodies compromises not easily reached, which are often then euphemistically described as "delicate balances." That internal balance could be easily destroyed if the act were subject to continual amendment.

S. 38 reflects a fragile consensus, carefully crafted over the last several years. It is a bill which provides benefits for all the affected interest groups. It benefits workers by facilitating the processing of occupational disease claims. It also benefits retired workers who become impaired as a result of a late manifesting occupational disease by affording an opportunity to obtain compensation. It enhances the insurability of the program, thus benefiting both insurers and self-insurers, by making the cost more predictable. It benefits certain employers in the shipbuilding industry by restoring an original purpose of workers' compensation, namely to immunize employers from tort suits as the quid quo pro for paying compensation. It benefits the Department of Labor, which administers this program, by providing greater manpower

resources by which to adjudicate longshore cases. Finally, it benefits all participants in the compensation system by establishing new sanctions to deter those who have defrauded and abused it.

* * *

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

TUESDAY, JUNE 16, 1981

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The subcommittee convened, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Hawkins.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning.

Today is the first of 3 days of hearings on the Longshoremen's and Harbor Workers' Compensation Act, and legislation that Senator Sam Nunn and I have proposed to amend Senate bill 1182.

When the act was first amended in 1972, it became a free ticket to rip off the consumer and taxpayer. So much so that in the 5 years after the changes were made, reported injuries jumped 185 percent. The chart to my right clearly shows that as benefits skyrocketed, the number of claims shot up right along with them. In 1972, 72,000 claims were filed. That number jumped to over 205,000 by 1977, meaning that nearly 1 in 5 employees filed a claim.

This act, in my opinion, has two fundamental problems; first, it is loaded with provisions that encourage

fraud and corruption. Hearings before the Senate's Permanent Subcommittee on Investigations earlier this year, concluded that the act is abused by organized crime. Our first witness today, Senator Nunn, spearheaded the investigation on waterfront corruption. I am sure he will be able to shed more light on the subject today. Second, organized crime is attracted to the act because of its more-than-generous payouts as now provided.

I believe it is important to provide sound worker's compensation, but the Longshoremen's Act has become a national disgrace at a time when commonsense seems to be finding its way back into Government. Now is the time to revamp the act in line with commonsense policy.

There are many cases that describe the absurdity of the system, which would sound like horror stories to the average working man or woman, but are commonplace on our Nation's waterfronts.

Take one of the commonplace examples from Shippers Stevedoring Co. in Houston. One of their longshoremen injured his right forearm on the job in May of last year. Because of his $33,000 annual salary, he automatically received about $426 a week in tax-free compensation – which was the maximum at that time. They paid him for nearly a year, and he received a total of over $18,500. In addition to that, the man's doctor said the employee would have a 25-percent impairment for the next 61 weeks, and the company was forced to pay an additional $26,000 during that time. So the company paid a total of nearly $45,000 in 1 year, all of which was tax free.

But that is not all. While he was receiving the additional $26,000 because of his impairment, he was also working in another job and was earning about $25,000.

The total two salaries, or the money that he made that year, exceeded $70,000 a year, $45,000 of which was tax free.

You can see by this graph that benefit increases in the act have far outstripped the growth of related economic indexes. In many cases, the benefits often exceed an employee's preinjury take-home pay. This is ludicrous, and goes way beyond the intent of worker's compensation.

The benefits under the Longshoremen's Act have increased 551 percent from the period 1972 to the present. Benefits in 1972 were $70; present matching benefits, $456 – an enormous increase. At the same time, the cost of living increased 97 percent; the CPI index and the national average weekly wage also had enormous increases.

The act also includes an unlimited, annual, tax-free escalation of disability benefits; an "unrelated death benefits" clause – meaning, for example, that if a person receiving disability benefits dies from a cause unrelated to his employment or injury, like an automobile accident, his survivors receive benefits – often more than the deceased could have received had he lived; injured employees may choose their own doctors for verifying injury claims; mandatory rehabilitation is not required, and all filed claims are presumed to be valid.

Coming from managing a small business in Oklahoma, where I was directly involved in worker's compensation administration, I am appalled that the Longshoremen's Act has been allowed to flourish unabated.

Last week, the New York Times published an editorial calling for changes in the act; citing the shipbuilding industry, where insurance costs have increased ninefold

since 1970. In fact, according to recent statistics, for every $100 in salaries, employers are compelled to pay an additional $87.24 in compensation costs – this is in New York.

These outrageous costs are passed on to the shippers and three things are happening as a result.

First, as you can see in this diagram, many shippers are avoiding U.S. ports where they can, primarily working through Canadian ports where compensation costs are about $5 for every $100 in salaries. This needs to be compared to what they are in New York. For example, in the chart, it shows St. John, New Brunswick, where the rates presently are $3.40 per $100 of compensation. Compare that to only 400 miles south, in New York, the rates are $87. So if my math is somewhat correct, we are looking at almost 30 times the rate in New York for compensation costs as compared to what it is in Canada.

It is little wonder that shippers would go that 400 miles to save on such a tremendous burden. And for those who are not familiar with workers' compensation, when we talk about $87 per $100 of payroll, we are talking about if the employer pays an individual $20,000 he has to pay $16,000 to $17,000 in workers' compensation costs. We are saying 87 percent of compensation has to be paid in workers' compensation premiums.

Over 7 million tons of cargo were diverted through Canada in 1976 through 1979, which amounted to a little over $9 billion. Mexico will soon be in the business, as they are also building and expanding their ports.

Second, and very importantly, when business is diverted out of this country, jobs are lost. Entire companies

can go out of business, and the whole Nation suffers as a result.

Another example of the act's depressive effects is here, in Washington, D.C., where all private employees are covered by the act. It is estimated that for every mile of track laid in the D.C. Metro system, employers paid $1.9 million in workers' compensation. Compensation rates in the District are several times higher than in neighboring Maryland or Virginia, even though this country has one of the cleanest records of work-related injuries and illnesses. If every State's compensation program was operated like this, few businesses would be able to survive.

Third, all consumers are affected by the act. It is estimated that Longshore compensation costs can push up the wholesale price of an item by as much as 25 percent. Every additional cost is passed directly to you and me. The Government has turned its back on every consumer by not acting to correct the injustices in the act.

The act must be amended for purely economic reasons. My criticism is directed at the Government for allowing the act to mushroom beyond original intent, and against those groups or individuals who abuse the law for personal benefit. The legislation under consideration would help restore balance by removing obvious inequities, significantly reduce fraud and corruption, aid ailing U.S. port authorities, and assure prompt delivery of generous compensation benefits and medical treatment to those deserving injured employees.

OVERSIGHT ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 1980

TUESDAY, SEPTEMBER 16, 1980

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr., (chairman) presiding.

Present: Senator Williams.

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. Come to order.

Today we are holding oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act.

The committee has been aware and concerned for some time about employer dissatisfaction with the functioning of the Longshore Act. I and other members of the committee have received substantial correspondence on this subject, and we have held a number of meetings with representatives of covered employers. As long ago as May and June of 1979, I had the opportunity to meet with representatives of stevedoring companies in New Jersey and to visit facilities at Port Newark and Port Elizabeth in New Jersey.

We have also been monitoring hearings on the Longshore Act conducted by committees in the House of Representatives. House committee hearings from the 95th

Congress alone took 17 days, and the printed report of those hearings is nearly 1,900 pages long.

We have also been following the hearings held in the House this year, and have had an opportunity to review the testimony presented there, although the formal hearing record has not yet been published.

With this extensive background of consideration of employer concerns about the act, I am hopeful that today's hearings will be well focused on the most important issues that have been raised concerning the act.

We are pleased that we will have an opportunity to hear this morning from Assistant Secretary Elisburg. The Department of Labor plays a special role in interpreting and administering the act, and it will be helpful to receive the Department's views on the issues that we will be considering.

We will also be pleased to hear from the unions representing workers protected by this act.

* * *

STATEMENT

on

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT REFORM

for submission to the

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

for the

CHAMBER OF COMMERCE OF THE UNITED STATES

by

Eric J. Oxfeld*

September 26, 1980

The Chamber of Commerce of the United States is pleased to have the opportunity to comment on the Longshoremen's and Harbor Workers' Compensation Act in connection with general oversight hearings on the Act conducted by the Senate Committee on Labor and Human Resources.

The U.S. Chamber is the world's largest business federation, composed of more than 101,000 members, including 97,000 business firms, 2,700 state and local chambers of commerce in the United States and abroad, and 3,300 trade and professional associations.

The serious flaws of the Longshore Act are having an adverse affect on every business member of the Chamber.

---

* Associate Director, Employee Benefits, Chamber of Commerce of the United States

As employers, many Chamber members now are required to provide workers' compensation coverage for their employees under the Longshoremen's and Harbor Workers' Compensation Act (the Longshore Act), and many other members could find themselves in the same circumstance as a result of judicial decisions expanding the Act's jurisdiction. Furthermore, because the Longshore Act frequently is touted as a model for state workers' compensation systems, every business member of the Chamber has an interest in the Act. As a private employer located in the District of Columbia, the Chamber itself is under the jurisdiction of the Act.

This statement focuses on identifying the defects in the Longshore Act. We are cognizant that several bills to amend the Act are pending in Congress, and we will comment on the specifics of those proposals at a later time. Nevertheless, we do wish to call the Committee's attention to one bill, H.R. 761D, which would remedy many of the flaws in the Act.

The multitude of problems that employers presently under the Act are experiencing is of concern to all employers nationwide. The Chamber, which has long been working to maintain a fair and effective workers' compensation system, therefore must ask Congress to enact some sorely needed amendments to the Longshoremen's and Harbor Workers' Compensation Act.

CHAMBER POSITION

The Chamber shares the committee's hopes for a modern workers' compensation system for the maritime industry and for the District of Columbia, a system that meets the needs of today's work environments. The

Longshoremen's and Harbor Workers' Compensation Act, however, does not meet those needs as the Act presently is worded, interpreted, and administered.

The purposes of the Longshore Act are to provide fair, certain, adequate, and prompt job-disability benefits to persons in certain maritime industries – longshoremen and harbor workers – and a few groups of workers not otherwise covered by state workers' compensation laws.

As a result of oversights by legislative draftsmen and a misguided notion of fairness and adequacy when the Act was drafted, coupled with maladministration, judicial misinterpretation, and continual double-digit inflation, the Longshore Act has deteriorated from a "model" law to a national scandal. Despite commendable efforts by the labor Department to reduce the backlog of pending claims and to improve over-all administration, the Longshore program remains notorious for being dilatory in the delivery of benefits ineffective in weeding out questionable claims, and exorbitantly expensive for employers. These problems have convinced us that if the current situation is left unchanged, some employers may be forced to go elsewhere (i.e., to Canada or Mexico), go "bare" (i.e., fail to insure), or go under (i.e., out of business).

* * *

SERIOUS DEFECTS IN LONGSHORE ACT

The 1979 Cooper* study of the Longshore program confirmed that "very liberal benefits" coupled with "a

---

* Cooper and Company, *Insurance Arrangements Under the Longshoremen's and Harbor Workers' Compensation Act, Phase I Draft Final Report* (Stamford: 1979).

propensity to make and exaggerate claims" are causing "serious problems." Specifically, employers are experiencing severe problems with benefits, the physician selection process, the lack of vocational rehabilitation, persistent maladministration, and a perplexing set of jurisdictional guidelines. It is not hard to understand why the Longshore program is so exorbitantly expensive.

I. Inadequacies of Benefits System

- *Wage replacement ratio* – Workers' compensation cash benefits are intended to replace a proportion of income lost (wage replacement ratio) because of job-related disability or death. These benefits are provided at the employer's expense, tax-free to the recipient. The wage replacement ratio used almost universally is two-thirds of pre-injury wages, which originally was thought to provide an adequate level of income without creating disincentives to return to work upon recovery.

  At present, however, a replacement ratio of two-thirds results in a windfall for higher paid workers. Inflation, the progressive income tax, and the advent of the dual income family are the reasons – as family income increases, workers are bumped up to higher tax brackets, and two-thirds of gross wages *tax-free* can easily exceed pre-injury take-home pay. With other economic savings factored in – the cost of transportation, meals, etc. – the incentive to abuse the system is high indeed. When benefits from other sources – i.e., Social

Security, pensions, sick leave, welfare, and so on – are paid as well, Longshore benefits can become a bonanza for not working.

- *Maximum benefit* – Only one state, Alaska, has a higher maximum benefit than the Longshore Act. Effective October 1, 1979, the maximum weekly benefit under the Act is $426, which represents the benefit paid to a person whose annual income is well over $33,000. These benefits will be increased again in just a few weeks. The average individual annual income for the United States is $12,144 and $16,145 for the District of Columbia (1978 statistics). The Longshore maximum, therefore, is far out of line with salaries.

- *No maximum on death benefits* – The Supreme Court, in its wisdom, has ruled in *Rasmussen v. Director of OWCP* that, contrary to 50 years of practice under the Longshore Act, there is no upper limit on death benefits. The surviving dependents, therefore, receive weekly benefits equal to two-thirds of pre-accident weekly wages, tax-free, no matter how much the deceased worker was earning. No state system pays death benefits without any maximum whatsoever. The absence of any upper limit makes prediction of insurance losses highly speculative, pushing costs up to cover "worst case" situations.

- *Unlimited COLA* – The Longshore Act is one of a very few workers' compensation systems that automatically grant benefit increases to persons already receiving benefits, to accommodate changes in the cost of living. The cost-of-living adjustment (COLA) is pegged to increases in the national average weekly wage. In order to insure COLA benefits

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 1980

TUESDAY, NOVEMBER 13, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LABOR STANDARDS,
COMMITTEE ON EDUCATION AND LABOR
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2261, Rayburn House Office Building, Hon. Edward P. Beard (chairman of the subcommittee) presiding.

Members present: Representatives Beard, Williams, Erlenborn, and Edwards.

Staff present: Earl F. Pasbach, staff director; Edith Baum, minority counsel; Bruce Wood, minority counsel; Dorothy L. Strunk, minority staff assistant; Mary Lou Granahan, Carole DiDomenico and Morton Blander, staff assistants.

Mr. BEARD. The Subcommittee on Labor Standards will now come to order.

Good morning, ladies and gentlemen; I am Congressman Beard, chairman of Labor Standards Subcommittee.

Today will begin 5 days of oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act.

There has been much controversy about this act. Many have called for changes and I look forward as chairman, along with others on this committee, to hearing

the testimony of the various individuals who will testify on behalf of groups, organizations, and so on.

* * *

STATEMENT OF HON. JOHN N. ERLENBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. ERLENBORN. Mr. Chairman, if I might ask the committee merely to accept my statement for the record, I trust my colleagues will read it carefully and I will save the time of the subcommittee.

Mr. BEARD. Thank you. It will be incorporated into the record, Mr. Erlenborn.

[The prepared statement of John Erlenborn follows:]

PREPARED STATEMENT OF HON. JOHN N. ERLENBORN, REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Mr. Chairman, as the ranking Republican of the Subcommittee on Labor Standards and the chief sponsor of legislation to amend the Longshoremen's and Harbor Workers' Compensation Act, I am particularly pleased you have decided to hold hearings on the serious problems associated with this Act.

These hearings, I am confident, will buttress the extensive record already compiled by the Compensation, Health and Safety Subcommittee's examination of the Act during 17 days of hearings in the 95th Congress. Those hearings highlighted the difficulties in administration and shortcomings in the legislation itself which have had

adverse consequences to employers and insurers and to employees in that the Act does not mandate rehabilitation, nor do the Act's liberal benefits encourage rehabilitation and the return to work.

Now that our Subcomittee has jurisdiction over the Longshore Act, we bear the responsibility, however unpleasant, of correcting its many deficiencies. As a basis for our discussions in this regard, I have introduced H.R. 2448, which is virtually the same as H.R. 13593 introduced by Congressman Ruppe in the 95th Congress.

The most significant amendments since the Act's passage in 1927 occurred in 1972. The central purposes of the Amendments were to eliminate third party suits based on the admiralty doctrine of "unseaworthiness" and consequent indemnity actions against employers covered by the Act, and to raise benefit levels for employees.

However, as all of us now know, more – much more – was accomplished by this legislation. It is unfortunate, indeed, that Assistant Secretary of Labor Elisburg, who has responsibility over the Longshore Act and who played so prominent a role as a Senate aide in drafting the 1972 amendments may not testify at our hearings.

Questions over whether and how to compensate employees injured in maritime activities proximate to navigable waters have spawned litigation for most of this century. Finally, by 1972, the courts were able to well-define jurisdiction under the Act. The ensuing respite was short-lived, as the 1972 amendments re-opened a pandora's box of litigation. The Amendments, as well as subsequent Labor Department and court determinations, have resulted in uncertain parameters governing employer liability. Indeed, an employer's liability now is so speculative

as to make insurance required by the Act extremely expensive, if not unobtainable.

The explosion in litigation and costs relative to the 1972 Amendments has stemmed more specifically from an extension of the Act's jurisdiction – uncertain in scope – payment of benefits from deaths unrelated to employment, absence of a ceiling on death benefits, and an uncapped escalation of benefits geared to increases in the national weekly wage.

The Act's imprecision has brought complaints from the Federal judiciary. In the [illegible] case, decided in 1977, the Chief Justice termed the Act "... about as unclear as any statute could conceivably be ...," to which the lawyer for the government replied with unsurpassed understatement, "It leaves something to be desired." Clearly, when the Federal judiciary repeatedly states its difficulty discerning Congressional intent, Congress should re-examine the law and restate its intent clearly and concisely. That, I am sure, will be the central message of these hearings and is one matter addressed by H.R. 2448.

The Federal courts have also stated that the 92nd Congress did not undertake any study of what the total impact and costs of the 1972 amendments would be on the employers or the nation as a whole. Premiums for insureds and costs to self-insured employers have skyrocketed. For example, in 1972 the premiums established by the New York State Compensation Rating Board for general stevedoring was $29.90 for every $100 of payroll. Today that rate is $87.24 per $100 of payroll, which translates to an actural payment of $261 per employee per week – over $13,000 per employee per year. A recent government report indicates that for all U.S. industry the average cost

of workers' compensation is $1.50 per $100 of payroll and the average cost nationwide for the stevedoring industry is $50 per $100 of payroll. A recent study shows that 6 per cent of gross industry revenue was spent on Longshore Act compensation.

Each year, benefits rise steadily, due to indexing based on the nationwide average weekly wage. There is no limit to the annual escalation, and the benefits are tax-free. The maximum weekly compensation in 1972 was $70 – now it is $426. It is claimed that the automatic escalation feature of the Act by itself makes liability so unpredictable as to be uninsurable. It is also stated that, because of the uncapped escalator, reinsurance is difficult to obtain. H.R. 2448 would limit the escalator to 3 per cent each year, but many suggest that the inflationary escalator should be eliminated completely.

The concept of workers' compensation is to replace on injured worker's lost earnings. However, the Act contains "unrelated death" provisions which give full death benefits to survivors of injured workers who are collecting benefits for permanent total disability but who later die from causes totally unrelated to the industrial accident. One can only imagine how this concept of life insurance crept into a worker's compensation statute. To my knowledge, no other workers' compensation law, state or federal, includes such a provision. H.R. 2448 would eliminate this inequity.

Another feature of the 1972 amendments was removal of a uniform limitation on death benefits. The Act now permits survivors or injured workers to receive more in benefits than the injured worker would have, had he lived. I am told no other compensation law contains this premium

on death. Many, including the Secretary of Labor, claim the exclusion of the uniform limitation was a mistake or an oversight in 1972. Despite his assertion, the Supreme Court in the 1979 *Rasmussen* decision held that Congress deliberately removed any uniform limitation in the 1972 Amendments. H.R. 2448 would limit death benefits to the same rate as compensation benefits are limited, to a maximum of 200 per cent of the average weekly wage.

One final thought: While all the problems with the Act I have cited must be addressed in any serious re-examination of the Act, implicitly this Subcommittee also must consider two, more fundamental, issues. First, what is the purpose of disability compensation? Is it merely to replace lost wages – the initial purpose of workers' compensation – or is it to be a broadened concept, in which principles of life insurance, pensions, and punitive damages are infused? Certainly, the Longshore Act presently recognizes this broadened concept.

Second, is it appropriate to retain the ultimate administrative determination of compensation under the Act in the Benefits Review Board, a unit of the Department of Labor which is, in effect, under the control of the Secretary of Labor? I find this politicizing of benefits unsettling. Indeed, it is yet one more source of the unpredicability which permeates the Act. Accordingly, H.R. 2448 removes the jurisdiction of the Board over Longshore Act cases. Initial compensation determinations would continue to be made by district commissioners – civil service employees – with appeal to the Federal district courts.

Assistant Secretary Elisburg testified that there has been no comprehensive review of the Act since its passage in 1927, even in view of the 1972 changes. This subcommittee

has the responsibility to take this step and to propose the legislative remedies necessary to make the Act fair to all parties and the liabilities under it insurable, predictable, and affordable to employers subject to it. I hope we will meet our obligation.

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Part 2

TUESDAY, MAY 2, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY,
COMMITTEE ON EDUCATION AND LABOR
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:20 a.m., in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, and Zeferetti.

Staff present: Paul F. Dwyer, counsel to the subcommittee; Edith C. Baum, minority counsel for labor; Bernard Mandella, staff director to the subcommittee; Marsha A. Gray, staff assistant; and Terre H. Belt, writer/researcher.

Mr. GAYDOS. The Subcommittee on Compensation, Health and Safety will come to order.

I would like to welcome my colleague, Mr. Young, from the distinguished Rules Committee, and I think we can proceed. You can introduce your constituent, Congressman. I know you have a very busy schedule.

STATEMENT OF HON. JOHN YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. YOUNG. I do thank you, Mr. Chairman. It is an honor and a privilege for me to be here before you and this committee.

The Subcommittee on Compensation, Health and Safety in my judgment is very courageously undertaking to sort out one of the most difficult and complex problems existing between the admixture of admiralty jurisdiction and State jurisdiction on this very important question of compensation of people working on vessels. It has been a problem for years, for many reasons that the committee knows about and that I won't take the time of the committee on.

* * *

B. With Respect to L & H Claimants?

> With respect to Longshore and Harbor Workers' claimants we set the same goals, provide the same opportunities but do not get the same results we get on state cases. We feel this is due to lack of motivation to return to work because of the monetary gain built into the high compensation rate. We have been discouraged by one of the better pain clinics from admitting longshore and harbor workers' cases because of poor results which they attribute to the secondary gain caused by the federal law. This is a clinic that normally gets good results and gets patients back to work. Most of the longshoremen are men who do not want to change vocations, as they would make less than when drawing compensation.

Case Example 1 – A 57 year old longshoreman with a back injury made $300 a week from compensation. His pain continued despite being sent to a pain clinic, receiving medication and exercises. He refused to follow a program at home. When vocational rehabilitation was suggested his pain got worse. He mentioned to his rehabilitation nurse that only money would cure his pain. The claimsman is now trying to settle with him.

Case Example 2 – A 35 year old fork lift operator received a partial foot amputation. He was fitted with a partial foot prothesis. He was able to walk and drive. When vocational rehabilitation was mentioned, he said he was not smart enough and that he did not want a new trade at less money.

We do have one 60 year old amputee who is going to school in electronics. Another longshoreman is up for vocational evaluation and one is being set up for schooling. Our goal on the longshore and harbor act cases are to control the medical cases as best as possible and prevent potential complications. Based on these goals our results are good.

C. How do you think the Longshore and Harbor Workers' Act can be improved to return more claimants to work and get them off the compensation rolls?

Make the employer part of the rehabilitation team by providing the injured worker a job he can handle while partially disabled before being released to return to work to full duty. The possibilities of returning to work improve considerably if the compensation payments are limited in amount and/or duration to eliminate the secondary gain of being off work.

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Part 1

MONDAY, SEPTEMBER 26, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY,
COMMITTEE ON EDUCATION AND LABOR
Washington, D.C.

The subcommittee met at 10:07 a.m., pursuant to call, in room 2261, Rayburn House Office Building, Hon. Joseph M. Gaydos (chairman of the subcommittee) presiding.

Members present: Representatives Gaydos, Le Fante, and Corsell.

Staff present: Paul F. Dwyer, subcommittee counsel; Marsha Gray, staff assistant; and Richard Mosse, assistant minority counsel.

MR. GAYDOS. The Subcommittee on Compensation, Health and Safety will be in order.

The record will show that there are two members of the committee present, and others are on their way. I apologize to the first group of witnesses on the panel that we didn't start on time but Monday morning is very difficult for this committee and other committees because members are returning from districts scattered throughout the entire country.

On behalf of the committee I want to thank you for your appearance here today. I request you to make your

presentation in the manner you deem best and which would be most suitable to you. You may summarize your testimony or you may read it. First, without objection, the submitted testimony will become a formal part of the record of the proceedings before this committee.

* * *

STATEMENT OF ROBERT GALLOWAY, EXECUTIVE VICE PRESIDENT, SUN SHIPBUILDING & DRY DOCK CO.

Mr. Galloway. Sun Shipbuilding & Dry Dock Co. is located in Chester, Pa., on the Delaware River, 10 miles south of Philadelphia. We employ 4,300 individuals and have been building oceangoing commercial vessels since 1916. Our specialty has been tankers, roll-on/roll-off ships, ship repair work, and a variety of heavy fabrications for industrial use. Some of our projects that might be familiar to you have included the conversion of the SS *Manhattan* from a tanker to an icebreaker which successfully navigated the Northwest Passage to Alaska. We also built the *Hughes Glomar Explorer* which gained notoriety for its role with the CIA in attempts to salvage a Russian submarine from the floor of the Pacific Ocean.

* * *

ECONOMIC INCENTIVES

The act now provides benefits calculated at 66⅔ percent of average annual wage. This money is tax free. In our yard an individual would have deductions from gross wages like federal income tax, 20 percent; social security; Pennsylvania State tax; City of Chester tax; union dues, travel, lunch, et cetera, which I put in at 3 percent. These amount to 31.85 percent.

This means he is taking home only 68 percent of gross pay. Workers' compensation pays him 66⅔ percent. We are not arguing for a change in benefit level but we are asking that you understand what this does to an individual. The work ethic has changed in the last decade and there is no incentive, economic or otherwise, for some to return to work. Doctors extend excused disability at a patient's request. The net result is many individuals who would otherwise be active and productive human beings are put on a shelf for life.

An employee of ours on workers' compensation has moved to Florida and has refused to accept rehabilitation twice recommended by his own doctor. We referred the matter to the Florida office who have advised that they will not pursue the case. Kenneth Ailsworth, chief of rehabilitation in Jacksonville, writes that: "Rehabilitation is an option available to the injured worker." This worker declines the option and the case is filed. Sun Ship's weekly payments continue.

Do you realize that individuals have collected social security, company pension, unemployment compensation, and workers' compensation simultaneously?

Where do we go from here?

We have an active and vigorous safety program at Sun Ship. We continually introduce the use of new safety devices, continue to educate our employees, and even use disciplinary measures to enforce safety rules. But, we have no control over heart attacks, hearing loss outside the yard and other nonwork related problems. We have no control over our employees lives in areas like exercise, weight control, smoking, and diet, et cetera. Yet we are asked to assume financial responsibility in the form of workers' compensation for any possible casual relationship between

the work environment and the health of the employee, even if no accident has occurred.

Our experience at Sun Ship is typical of the industry. Costs have risen from $175,000 in 1972 to $1,156,000 in 1976. Mr. Hood mentioned one other shipyard on the east coast as being three times. Ours are six times. He mentioned in 1980 a prediction, that it would be 16 times. I think ours are going to be closer to 25 times.

I have tried to outline why this has happened. We have no place to put these costs but to add them to the cost of the product. This makes it harder to sell ships in a world market and increases the woes of an already troubled industry which the Federal Government has declared an industrial capability our country must maintain.

I started these remarks with a statement as to whether or not we have an act at all. I hope that I have given the committee one shipbuilder's viewpoint on the confusion, inequities, and outright mismanagement of workers' compensation laws and employee benefit programs under which employers like Sun Ship are forced to do business.

I have to say I only pointed out some of the gross defects which are in the present act. Others will follow. These include: 1. Presumption and resolution of doubts; 2. loss of wage earning capacity; 3. preexisting conditions; 4. death cases; and 5. incentives and rehabilitation.

I urge this committee to call upon your colleagues in the House and Senate to bring about legislation to correct the disgrace and injustice caused by the Federal Longshoremen's and Harbor Workers' Act.

Thank you for the opportunity to appear before the committee today.

* * *

OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

TUESDAY, NOVEMBER 27, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LABOR STANDARDS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2261, Rayburn House Office Building, the Honorable Edward P. Beard (chairman of the subcommittee) presiding.

Members present: Representatives Beard and Erlenborn.

Staff present: Earl F. Pasbach, counsel; Carole DiDomenico, staff assistant; Morton Blender, staff assistant; Edith Carter Baum, minority counsel for labor; Dorothy Strunk, assistant minority counsel for labor; and Bruce Wood, assistant minority counsel for labor.

Mr. BEARD. Good morning, I am Congressman Beard, chairman of Labor Standards, and this is one of a series of hearings we have had on the Longshoremen's and Harbor Workers' Compensation Act.

The first witness will be Mr. John C. Swanson, attorney for Metro.

Mr. Swanson, do you have a prepared statement?

Mr. SWANSON. Yes, I do, and I believe I turned it in.

Mr. BEARD. Your statement will be incorporated in the record in total, and we would appreciate it if you could summarize.

STATEMENT OF JOHN C. SWANSON, ATTORNEY, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY (METRO)

Mr. SWANSON. Thank you very much. My name is John Swanson. I am representing the Washington Metropolitan Area Transit Authority – Metro. Metro was created by interstate compact by and between Maryland, Virginia, and the District of Columbia. Its primary function is to plan, develop, and to finance and provide for the operation of a rapid rail transit system serving the Washington metropolitan area.

As an employer located in the District of Columbia, Metro comes under the provisions of the Longshoremen's and Harbor Workers' Act. This act, though specifically designed to provide workers' compensation benefits to those individuals who are employed in maritime occupations on and around the docks and marine facilities of the United States has, since 1928, been the basis for claims in a city with little or no maritime employment. This misapplication subjects the District of Columbia to a workers' compensation

* * *

c. Three of the seven actually enter a rehabilitation program. One and a fraction of the three are not rehabilitated for various reasons, among them being absenteeism and refusal of help due to family and educational problems. What percentage does each category constitute?

Response:

Cases were closed not rehabilitated in FY 1979 for the following reasons:

1. Thirty-one percent had a medical exacerbation.
2. Nineteen percent lost interest.
3. Eighteen percent refused to change unrealistic expectations.
4. Eleven percent dropped out and refused further contact.
5. Eight percent settled their case.
6. Six percent returned to a job that will cause further medical problems.
7. Four percent developed educational problems and refused help.
8. Two percent developed family problems and refused help.
9. One percent returned to the pre-injury job.
10. Zero percent had excessive absenteeism.

d. One and a fraction of the three who enter a rehabilitation program are rehabilitated. Overall, you indicated that of 40 of 100 injured workers referred to a rehabilitation specialist, three enter a rehabilitation program and one and a fraction are rehabilitated. Has there been improvement in these percentages over the past 18 months?

Response:

There has been improvement in the number of people rehabilitated. Cases rehabilitated in FY 1978 were 1.5% of cases being compensated. Cases rehabilitated in FY 1979 were 1.7% of cases being compensated and cases rehabilitated in the first quarter of FY 1980 were 1.9% of cases being compensated.

e. In any case, should a workers' compensation program sanction refusal to enter, participate in, and complete a rehabilitation program where an injured worker has been evaluated as rehabilitative?

Response:

If the Act were to require the employer to pay temporary total compensation during the rehabilitation effort, then it should also require the injured worker to participate in rehabilitation.

* * *

33 U.S.C. § 902(10) states:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; *but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).**

---

* 33 U.S.C. § 910(d)(2) refers to retired workers and is not at issue in this case.

33 U.S.C. § 906(b)(1) states: "*Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).*" (italics in the original)

33 U.S.C. § 908(a) states:

> Compensation for disability shall be paid to the employee as follows: (a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

33 U.S.C. § 908(b) states: "Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof."

33 U.S.C. § 908(e) states:

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wage before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 939(c) states:

> (1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such service available.
>
> (2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in State or Territories, possession, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this Act to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 44 in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the cost of administering this subsection.

No. 05-371

In The

Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE LONGSHORE INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS C. FITZHUGH III
Counsel of Record
MATTHEW H. AMMERMAN
NICHOLAS W. EARLES
FITZHUGH, ELLIOTT & AMMERMAN
12727 Kimberley Lane, Suite 302
Houston, Texas 77024-4053
(713) 465-7395
Counsel for Amicus Curiae,
The Longshore Institute, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS -- Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES -- Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES -- Continued

OTHER AUTHORITY

TABLE OF AUTHORITIES -- Continued

BRIEF FOR THE LONGSHORE INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

The Longshore Institute, Inc., as *amicus curiae*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTEREST OF THE *AMICUS CURIAE*

The Longshore Institute, Inc. ("TLI") is an association dedicated to the proper administration of the Jones Act, 46 U.S.C. app. § 688, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50, and the extensions of the LHWCA, *viz.*, Defense Base Act,[2] 42 U.S.C. §§ 1651-5; Outer Continental Shelf Lands Act,[3] 43 U.S.C. §§ 1331-56; Nonappropriated Fund Instrumentalities Act,[4] 5 U.S.C. §§ 8171-3; and, the War Hazards Compensation Act,[5] 42 U.S.C. §§ 1701-6. Established in 1995, its goals are to educate claims professionals, risk managers, judges, attorneys (both claimant and defense), longshore employers and insurers on the proper procedures and application of the LHWCA and recent developments in current law and regulations through educational programming and the reporting and analysis of all decisions by any court, including the Benefit Review Board, that affect the LHWCA.

---

[1] All parties have consented to the filing of this brief. Petitioner and Respondent have indicated their consent by filing a blanket consent for all *amicus curiae* with this Court. The Solicitor has specifically consented and the Solicitor's consent letter is filed contemporaneously with this brief. This brief was not authored, in whole or in part, by counsel for any party. No person or entity other than the *Amicus Curiae*, its members or its counsel, made a monetary contribution to the preparation of this brief.

[2] 42 U.S.C. § 1651(a) (incorporating the LHWCA).

[3] 43 U.S.C. § 1333(b) (incorporating the LHWCA).

[4] 5 U.S.C. § 8171(a) (incorporating the LHWCA).

[5] 42 U.S.C. § 1702 (incorporating the LHWCA).

To that end, TLI offers seminars and workshops covering the claims administration procedures, statutes, regulations, and case law decisions construing and governing the LHWCA; publishes and distributes materials discussing recent developments and LHWCA decisions, including the only national periodical devoted to the LHWCA (*The Longshore Newsletter*); publishes the standard reference on the LHWCA and claims procedures (*The Longshore Procedure Manual*); and collects, publishes and distributes a comprehensive collection analyzing published and unpublished decisions of the Benefits Review Board, the administrative appellate court charged with the adjudication of immediate appeals from decisions of the Office of Administrative Law Judges (*Brahm's Court Index*).

Since its inception in 1995, TLI has presented approximately 75 seminars to thousands of persons in locations across the United States, including approximately 25% of the sitting administrative law judges hearing LHWCA claims before the U.S. Department of Labor. In this manner, TLI is in a unique position to interact with persons from all across the nation who are working day in and day out with the LHWCA and gain the benefit of their experiences and concerns.

SUMMARY OF THE ARGUMENT

This case presents an important issue of federal law concerning the administration of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50, and the disregard for the procedures Congress created for awarding benefits by the U.S. Department of Labor, Office of Workers' Compensation Programs ("OWCP"), to award benefits. The LHWCA is far-reaching -- it extends to private

defense contractors' workers in Iraq,[6] workers in offshore oil production,[7] and contractors at in-country military bases.[8] For simplicity, we will use "LHWCA" to also describe all of the federal statutes that apply it by extension.

The Ninth Circuit's decision in this case legitimizes the OWCP's extra-statutory award of benefits through its vocational rehabilitation program. This is not authorized by any regulation or through rule-making. This award system was never approved by Congress, and upsets the adjudicatory balance created by the LHWCA. The practical effect of this unauthorized award is increased cost of coverage to the federal government and private business because of a vocational program with limited oversight (without the scrutiny of the litigation process or Congress) for limited results. This is not just a concern for private insurers. The War Hazards Act extension provides for the federal government to reimburse the cost of claims for workers injured by war risks in Iraq from federal funds. Therefore, extending unauthorized benefits significantly impacts the public fisc.

Ignoring this Court's interpretation of the LHWCA in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 281 (1980), the Ninth Circuit has redefined "disability," in the LHWCA, departing from the definition enacted into law by Congress. Congress defined disability

---

[6] The Defense Base Act is an extension of the LHWCA that makes the LHWCA applicable to employment injuries sustained by employees of private contractors working outside the United States for U.S. government defense contractors. 42 U.S.C. §§ 1651(a) - 1651(f); *Pearce v. Director, OWCP*, 603 F.2d 763, 769 (9th Cir. 1979). The War Hazards Act is an extension of the LHWCA that provides for reimbursement to private insurers from the federal government if the overseas injury was caused by a war hazard risk. War Hazards Compensation Act, 42 U.S.C. §§ 1701-6.

[7] Outer Continental Shelf Lands Act,[7] 43 U.S.C. §§ 1331-56

[8] Nonappropriated Fund Instrumentalities Act,[8] 5 U.S.C. §§ 8171-3

alternately as a decrease in wage earning capacity due to the injury or as a set period of weeks for scheduled injuries. The decision below mandates awards of total disability benefits to workers regardless of the nature of their injury or their actual level of economic disability. This additional, extra-statutory award of compensation extends benefits beyond the comprehensive scheme enacted by Congress.

Beginning with *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994), federal courts have upheld the award of total disability benefits to injured workers enrolled in OWCP-approved vocational rehabilitation programs. Such awards are not authorized by the text of the LHWCA. The *Castro* decision represents a radical expansion of *Abbott*. What originated as temporary monetary support for an injured workers' whose only employment opportunities were at minimum wage has been transformed into a *de facto* award of compensation created out of whole cloth.

The decision below blurs the clear line drawn by Congress between administrator and adjudicator under the LHWCA. In 1972, Congress amended the LHWCA and expressly divided administrative and adjudicative functions between two independent agencies, the District Director, OWCP (11 across the U.S.) and the OALJ. The *Castro* decision represents a return towards the pre-1972 LHWCA where a non-judge bureaucrat, the local District Director, is fact-finder. The award of benefits below was developed and approved by the Seattle District Director. Employer was not entitled to litigate the elements of the plan before the OALJ. Nonetheless, the plan and its details were the decisive factor determining the extent of the employer's financial liability.

OWCP vocational rehabilitation is intended to return injured workers to the workforce. As currently applied, the program creates clear disincentive to return to suitable

employment following a work injury. By divorcing the award of benefits from the statutory definition of "disability," an injured worker's actual loss of wage earning capacity, the Director rewards those workers who voluntarily remove themselves from the labor force and penalizes those workers motivated enough to seek remunerative post-injury employment. Based on the information received by TLI and from review of reported cases, in several instances workers are directed to programs that are unrealistic or undertaken with minimal effort, which is consistent with a desire to extend benefits beyond the statutory entitlement.

This problem will not soon abate. With the increasing number of U.S. workers employed abroad to perform U.S. government defense contracts in Iraq and Afghanistan the problems in *Castro* will only be repeated.[9] As more workers are brought within the jurisdiction of the LHWCA by virtue of the Defense Base Act, 42 U.S.C. §§ 1651-5, the number of injured workers entering OWCP vocational rehabilitation and receiving extra-statutory disability benefits will only rise. The Article I agencies and judges charged with administering this Act have already set up special procedures to handle the huge influx of claims from Iraq. This Court should exercise its discretion and take this opportunity to correct the problems inherent in the current OWCP vocational rehabilitation regime.

---

[9] Leigh Strope, *War Creates Insurance Claims*, HOUSTON CHRONICLE, June 17, 2004, online version at www.chron.com/disp/story.mpl/special/iraq/2632071.html

[12] *See e.g. Oberts v. McDonnell Douglas Services/Boeing*, 39 BRBS 117, 135 (ALJ)(2005); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 9 (2003); *Castro v. General Contr. Co.*, 37 BRBS 65 (2003); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286 (4th Cir. 2003); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Edmonds v. Al Salaam Aircraft Co.*, 35 BRBS 168, 174 (ALJ)(2001); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998); *Boucher v. Richmond Dry Dock Co.*, 29 BRBS 713, 716 (ALJ)(1995)